No. 92-1119

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

October Term, 1992

DUANE WENDALL LARSON, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

PETITIONER'S APPENDIX

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Pro Se
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Mission Viejo, CA 92692
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198 pp

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-2212 MN

Duane Wendall Larson,	*	
	*	
Appellant,	*	Appeal from
	*	the United
v.	*	States
	*	District
	*	Court
United States of America	*	for the
	*	District of
Appellee.	*	Minnesota
	*	
	*	(UNPUBLISHED)

Submitted: October 5, 1992

Filed: October 8, 1992

Before FAGG, BOWMAN, AND WOLLMAN, Circuit Judges.

PER CURIAM.

Duane Wendall Larson appeals the district court's order dismissing as successive and abusive his third motion for relief under 28 U.S.C. § 2255 and dismissing as untimely his motion to reconsider his first section 2255 motion. We affirm.

Having carefully reviewed the record, we conclude the district court correctly denied as successive Larson's third section 2255 motion, which raised the same Fourth Amendment, ineffective assistance of counsel, and evidentiary hearing issues as Larson's earlier motions. Larson simply disagrees with the earlier decisions. We also affirm the denial of Larson's motion for reconsideration of his first section 2255 motion.

In addition, we agree with the district court that Larson's discovery claim abused the writ. The Government satisfied its burden of asserting Larson abused the writ when it stated Larson

did not raise the issue in his first and second section 2255 motions. See McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991); Andiarena v. United States, 967 F.2d 715, 717 (1st Cir. 1992) (per curiam) (McCleskey standard applies to section 2255

proceedings). To disprove the abuse, Larson must show cause and prejudice to excuse his failure to raise the claim earlier. McCleskey, 111 S. Ct. at 1470. Because Larson knew of the discovery's existence, he cannot show prejudice. See United States v. Bagley, 473 U.S. 667, 678 (1985). Larson's right-to-testify claim is also abusive.

Accordingly, we affirm. We deny Larson's motion to argue his appeal.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-22122MNMI

Duane Wendall Larson,	*	
	*	
Appellant,	*	Order denying
	*	Petition for
vs.	*	Rehearing and
	*	Suggestion
	*	for
	*	United States
	*	of America,
	*	Rehearing En
	*	Banc
Appellee.	*	
	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

November 16, 1992

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

DUANE WENDALL LARSON,

Petitioner, Civil 4-91-192
(Cr. 4-83-84)

v.

UNITED STATES OF AMERICA,

Respondent.

On December 23, 1991, United States Magistrate Judge Floyd E. Boline issued a Report and Recommendation herein. Magistrate Judge Boline recommended that petitioner's third motion for relief under 28 U.S.C. § 2255 and his motion for reconsideration be denied. He also determined that certain motions for discovery were moot and that the petitioner's motion for an evidentiary hearing should be denied because he is not entitled to relief as a matter of law.

Petitioner requested additional time to prepare his objections to the Report and Recommendation and received it. He also

requested oral argument on his objections and filed a motion for return of property taken in 1983. The government has responded to petitioner's objections and to his motion for return of property.

In his objections petitioner indicates that he seeks "primarily a reconsideration of the district court's first writ finding." He seeks to reargue search and seizure points raised in earlier § 2255 motions. He also complains about what he asserts to be discovery violations and missing evidence. He denies that he

has abused the writ and claims that his right to due process has been violated. He again asks in his objections for an evidentiary hearing "to determine the correct amount of cocaine legally found (if any)."

Petitioner's objections require the court to make a de novo review and determination of the record which it has

done. Petitioner is a convicted drug dealer found with a very large amount of cocaine who has now served his time in prison but continues to argue technical points related to search and seizure issues. Petitioner made a knowing and willing choice at trial to prevent his two sets of counsel who were standing by at trial from defending his interests. This was a big mistake about which the court cautioned him many times. He should have permitted his counsel to develop the factual record at trial rather than to try to reconstitute the record years later. In this petition and in the material submitted in support of it and in objection to the Report and Recommendation, he continues to mischaracterize the record and this court's prior rulings.

After its de novo review, the court finds itself in basic agreement with the findings and conclusions of Magistrate Judge Boline. This petition is an abuse of

the writ, and petitioner has not made the required showing of cause and prejudice. Nor has he shown any fundamental miscarriage of justice in his case. The issues have been amply briefed and there is no showing that oral argument is necessary to elaborate on the written material. The petition should be denied.

- 2 -

The government has responded to the motion for return of property by indicating that all the property taken in 1983 was either made available to petitioner or destroyed and the motion is therefore moot. Petitioner replies with an allegation that this was intentional and planned evidence destruction, but he points to no support in the record for his conclusion. Based upon the record this motion should be dismissed as moot.

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1.) The petition for relief under 28 U.S.C. § 2255 and the motion for reconsideration are denied.

2.) The request for oral argument and/or an evidentiary hearing is denied.

3.) The motion for return of evidence taken in 1983 is dismissed as moot.

Dated: March 10, 1992

DIANA E. MURPHY
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
CIVIL 4-91-192
(CRIMINAL 4-83-84(1))

DUANE WENDALL LARSON,

Petitioner,

v. **REPORT AND RECOMMENDATION**

UNITED STATES OF AMERICA,

Respondent.

Before the Court are petitioner's motions for relief from his sentence under 28 U.S.C. § 2255 and for reconsideration of his first motion for § 2255 relief. This case was referred to the undersigned United States Magistrate Judge for Report and Recommendation under 28 U.S.C. § 636 and Local Rule 72.1. For the following reasons, the undersigned recommends that both motions be denied.

BACKGROUND

When he filed his § 2255 motion on March 7, 1991, petitioner was an inmate at the Federal Correctional Institution in

Sandstone, Minnesota, where he was serving an aggregate fifteen year sentence for his separate convictions on drug and tax offenses.[1] See United States v. Larson, Criminal 4-83-84(1) (D. Minn.); United States v. Larson, Criminal 3-85-43 (D. Minn.). Petitioner's drug conviction

was affirmed on direct appeal. See United States v. Larson, 760 F.2d 852 (8th Cir.), cert. denied, 474 U.S. 849 (1985). Petitioner then filed two previous § 2255 motions attacking this conviction. See Larson v. United States, Civil 4-86-483 (D. Minn.); Larson V. United States, Civil 4-88-750 (D. Minn). This Court denied both motions, and the denials were each upheld on appeal. See Larson v. United States, 833 F.2d 759 (8th Cir. 1987), cert. denied, 486 U.S. 1008 (1988) (first motion); Larson v. United States, 905 F.2d 218 (8th Cir.

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[1] Petitioner was released from prison in August, 1991.

1990) (second motion).

Petitioner's third § 2255 motion now raises the following four claims:

1.) Evidence admitted at his trial was obtained in violation of the Fourth Amendment because it was seized from closed containers without a search warrant;

2.) He "was not afforded the superior Bagley discovery process he is entitled to" under United States v. Bagley, 473 U.S. 667 (1985) and Teague v. Lane, 489 U.S. 288 (1989);

3.) He was denied effective assistance of counsel because counsel failed to raise the container search issue; and

4.) This Court's factual finding (made in the course of denying his first § 2255 motion) that the search of the containers was justified because some of the drugs were in plain view, is a "tainted" finding which should now be reviewed and reversed.

Motion, Docket No. 175 in Criminal 4-83-84(1), at 5-6. The fourth ground in also raised in petitioner's motion for reconsideration. See Docket No. 177. Petitioner also filed numerous motions for

permission to obtain discovery from the government (see Docket Nos. 176 and 178-182).

DISCUSSION

The court concludes that petitioner's third § 2255 motion and his motion for reconsideration should be denied. The first, third, and fourth claims raised in the third § motion are successive and therefore subject to summary dismissal, and the second claim is both abusive and meritless. Petitioner's motion for reconsideration is both untimely and an improper attempt to obtain further review of a successive claim.

I. Dismissal of Successive or Abusive Motions Under § 2255

Congress specifically provided in § 2255 that a court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 28 U.S.C. § 2255; see also 28 U.S.C. 2244 (a) (court need not entertain successive application for habeas relief where it is satisfied that "the ends of justice will not be served by such inquiry.") In Sanders v. United States 373

U.S. 1 (1963), the Supreme Court stated that:

> Controlling weight may be given to denial of a prior application for . . . § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Id. at 15 (footnote omitted). All three of these conditions must be satisfied before relitigation of previously rejected claims is barred. Williams v. Lockhart, 862 F.2d 155, 157 (8th Cir. 1988). Where the first two Sanders conditions are satisfied, a petitioner bears the burden of showing that a redetermination of the claims would serve the interest of justice. Id. (citing Sanders, 373 U.S. at 17).

Following Sanders the Supreme Court adopted rules for § 2255 proceedings that incorporated the Sanders standard for dismissal of successive motions (which

reassert previously adjudicated grounds) and also addressed the related problem of motions that are abusive because they raise new grounds (which should have been asserted in a previous motion). These rules provide that:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Rule 9 (b), Rules Governing Section 2255 Proceedings (emphasis added).

The Supreme Court recently adopted a "cause and prejudice" analysis for evaluating a second application for habeas relief that is alleged to be an abuse of the writ:

> When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and

particularity, it notes petitioner's

> prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard. If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.

McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991) (emphasis added). [2] The court also

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[2] While McCleskey dealt with an application for habeas corpus relief by a state prisoner under 28 U.S.C. § 2254, the decision is equally applicable to § 2255 motions from federal prisoners. See Davis v. United States, 417 U.S. 333, 344 (1974); Kaufman v. United States, 394 U.S. 217, 225-28 (1968); United States v. Palumbo, 608 F.2d 529, 532 n. 11 (8th Cir. 1979), cert. denied, 446 U.S. 922 (1908); but see Stone v. Powell, 428 U.S. 465, 482 (1976) (holding only that federal collateral review of fourth amendment claims by state prisoners is barred where there was a "full and fair opportunity" to litigate those claims in state court). The undersigned previously recommended that petitioner's fourth

stated that the "fundamental miscarriage of justice" exception "gives meaningful content to the otherwise unexplained 'ends of justice' inquiry mandated by Sanders." Id. at 1471. Finally, the court reaffirmed its holding in Kuhlmann v. Wilson, 477 U.S. 436 (1986), that federal courts are not required to entertain a successive petition unless a petitioner "supplements

a constitutional claim with a 'colorable showing of factual innocence.'" Id. (quoting Kuhlmann, 477 U.S. at 454).

The 'cause' factor adopted in McCleskey "requires a showing of some external impediment preventing counsel from constructing or raising a claim." Murray v. Carrier, 477 U.S. 478, 492 (1986). As the court stated in McCleskey:

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amendment claim be dismissed by extension of Stone v. Powell to § 2255 motions. See Report and Recommendation, Docket No. 133, at 4-9. This analysis has since been adopted by at least one federal court. See Curzi v. United States, 773 F.Supp. 540-41 (E.D.N.Y. 1991).

> For cause to exist, the external impediment, whether it be governmental interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim. Abuse of the writ doctrine examines petitioner's conduct: the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process .... The requirement of cause in the abuse of the writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant grounds for relief in the first federal habeas petition. If when petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.

111 S. Ct. at 1472 (citations omitted, emphasis original). Petitioner's claims will be measured against these standards.

II. Successive Nature of First, Third and Fourth Claims

Based upon a review of petitioner's third § 2255 motion and the record of the previous proceedings in this matter, the Court finds the first two elements of the

Sanders test are satisfied as to petitioner's first, third and fourth claims, each of which were

previously raised by him and denied by this Court on their merits. See Report and Recommendation, Docket No. 156 (Civil 4-88-750) (considering and rejecting all three claims raised in second motion); see also Larson, 905 F.2d at 219-21 (same); Larson, 833 F.2d at 758-59 (first and third claims denied on merits upon first motion). That petitioner's third § 2255 motion may have alleged some new facts or offered new legal arguments in support of these three claims does not alter the Court's conclusion that the claims themselves are identical. See Sanders, 373 U.S. at 16. Thus, petitioner cannot obtain further review of his first, third and fourth claims unless he demonstrates that the "ends of justice" would be served by such an inquiry. Id. at

15, 17; see also Williams, 862 F.2d at 157. This he cannot do.

The court is of course thoroughly familiar with the facts surrounding petitioner's drug conviction, which stemmed from the discovery of three pounds of nearly pure cocaine in a motel room. See Larson, 760 F.2d at 853-54. In affidavits filed with the Court, petitioner has gone so far as to describe how he transported and packaged that cocaine prior to his arrest. See Joint Appendix, Docket No. 183, at 48-50, 56-60, and 62-62. Even in the fact of such admissions, petitioner now argues that he should be allowed yet another opportunity to establish facts showing the cocaine was illegally seized and should have been suppressed, and that his counsel was ineffective for not pursuing his fourth amendment "container" claim. This is not a case where an innocent person was wrongly convicted due to mistaken identity, false testimony, or

an

unfair trial; rather, petitioner simply seeks to avail himself of the benefits of the exclusionary rule.[3] Under these circumstances petitioner cannot make the required "colorable claim of factual innocence." Kuhlmann, 477 U.S. at 454; see also McCleskey, 111 S.Ct. at 1475 (petitioner could not demonstrate that alleged violation of his rights caused conviction of an innocent person).

The Court therefore concludes that as a matter of law, petitioner has not and cannot met his burden of showing the ends of justice[4] will be served by reaching the

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[3] The justification given for the exclusionary rule is deterrence of police misconduct. See Mapp v. Ohio, 367 U.S. 643, 657-58 (1961). The rule has often been criticized because its application can result in dismissal of criminal charges without regard to the guilt or innocence of a defendant.

[4] In holding that petitioner's second § 2255 motion should have been dismissed as successive, the Eighth Circuit did not expressly address the "ends of

merits of his first, third and fourth claims. No fundamental miscarriage of justice will occur if those three claims are again denied as successive.

III. Abusive Nature of Second Claim

Petitioner's second claim essentially has two parts. First, petitioner contends United States v. Bagley, 473 U.S. 667 (1985), announced a 'new rule' that greatly expanded the scope of pretrial discovery in criminal cases. Secondly, petitioner claims the

Bagley rule became applicable to his case[5] when the Supreme Court adopted the retroactivity analysis set forth in Teague v. Lane, 489 U.S. 288 (1989). Thus,

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justice" element of Sanders. See Larson, 905 F.2d at 220-22. Magistrate Becker applied Kuhlmann to petitioner's second § 2255 motion and found he had not satisfied this third element of Sanders. See Report and Recommendation, Docket No. 156, at 6-8. This Court fully agrees with that analysis.

[5] There is no dispute that petitioner's conviction was not yet final when Bagley was decided in 1985.

petitioner argues he is "now entitled to the superior discovery process of Bagley as opposed to the inferior Brady discovery he was given." Motion, Docket No. 175, at 19. Petitioner's ultimate goal is to compel the government to disclose information which he believes will support his other three claims.

Petitioner's second claim is a new claim in the sense that it was never asserted at trial, on direct appeal, or in the two previous § 2255 motions. The government affirmatively and adequately alleged that this claim was an abuse of the writ. See Response, Docket No. 188, at 10, 13-15. Moreover, the Court has already concluded that no fundamental miscarriage of justice will occur if petitioner is barred from further collateral review of his drug conviction. See McCleskey, 111 S.Ct. at 1470. Thus, to obtain review of his second claim, petitioner must demonstrate both adequate cause for his

failure to raise the claim earlier and actual prejudice. Id.; see also Murray, 477 U.S. at 492.

With regard to cause, petitioner has not shown that any "external impediment" prevented him from asserting his Bagley claim in the earlier proceedings. Bagley was decided in 1985, before petitioner's conviction became final and well before he filed his first § 2255 motion in 1986. If petitioner believed he was

entitled to relief under Bagley he could have included the claim in his first (or even his second) § 2255 motion.

The fact that Teague was not decided until 1989 does not excuse petitioner's failure to assert his Bagley claim. As petitioner points out, the issue of whether a new rule[6] could be applied to cases on collateral review (as opposed to cases on

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[6] For purposes of this 'cause and prejudice' analysis only, the Court will assume that Bagley announced a 'new rule'.

direct review) was an open question prior to Teague. See Motion, Docket No. 175, at 18 (citing Griffith v. Kentucky, 479 U.S. 314 (1987) (holding only that new rules for conduct of criminal prosection would apply retroactively to all cases "pending on direct review or not yet final ...."). When Bagley was decided, questions of retroactivity were addressed on a case-by-case basis using the three-pronged analysis adopted in Linkletter v. Walker, 381 U.S. 618 (1965), and Stovall v. Denno, 388 U.S. 293 (1967). See Griffith, 479 U.S. at 320-21; see also Teague, 489 U.S. at 305 (discussing prior uncertainty in retroactivity analysis for cases on collateral review); United States v. Johnson, 457 U.S. 537 (1982) (reviewing previous retroactivity decisions and the dissenting opinion of Justice Harlan in Desist v. United States, 394 U.S. 244 (1969)).

The decision in Teague ended this

uncertainty by holding that with few exceptions, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Teague, 489 U.S. at 310

(emphasis added). This holding is phrased in the negative, and in light of the prior unsettled state of the law, Teague must be viewed as limiting the retroactive application of new rules to cases on collateral review. Petitioner is therefore mistaken in his contention that the Teague decision somehow enabled him to pursue his Bagley claim: since the issue of whether petitioner could avail himself of Bagley on collateral review was an open question from 1985 to 1989, nothing prevented him from testing the waters by raising the claim in either his first or second § 2255 motions.[7]

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[7] Petitioner was represented by private counsel on his second § 2255 motion, and therefore cannot be heard to claim that

The Court therefore finds petitioner cannot make the required showing of cause for his failure to raise the Bagley claim in his two previous § 2255 motions. See Murray, 477 U.S. at 486-87 (failure to recognize legal basis for claim does not constitute "cause" for a procedural default).

Nor can petitioner demonstrate any actual prejudice to his case from the claimed lack of discovery under Bagley.[8] All of the cases which have developed the government's duty to disclose, including Bagley, are based upon due process

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he was unaware of Bagley and the state of retroactivity law until the Teague decision. Further, petitioner's second § 2255 motion was pending before the Eighth Circuit when Teague was decided, yet he chose to proceed with the appeal rather than seek a remand to amend his second motion and raise the Bagley claim.

[8] Petitioner's claim that he is now entitled to discovery under Bagley appears somewhat confused, since he also expressly disclaims that Bagley was violated. See Motion, Docket No. 175, at 19 ("Petitioner makes clear from the outset that he is not alleging a Bagley violation ....").

considerations and the

recognition that it is fundamentally unfair for the government to withhold material information if the defendant would otherwise be unaware of that information. See Bagley, 473 U.S. at 678 (suppression of evidence "known to the prosecution but unknown to the defense" amounts to Constitutional violation only if it deprives defendant of a fair trial); see also United States v. Agurs, 427 U.S. 97 (1976) (prosecutor has obligation to disclose material, exculpatory information even in absence of defense request); Giglio v. United States, 405 U.S. 150 (1972) (government failed to disclose grant of immunity to witness); Brady v. Maryland, 373 U.S. 83 (1963) (failure to disclose confession of co-defendant); Napue v. Illinois, 360 U.S. 264 (1959) (prosecutor's failure to disclose his knowledge of perjury by witness). These principles are

not implicated where a defendant has personal knowledge of the information at issue. See Bagley, 473 U.S. at 682 (information is material and subject to disclosure "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."); see also Agurs, 427 U.S. at 108 (failure to disclose not a constitutional violation unless defendant is deprived of a fair trial).

Here the government has never been obligated by any of these cases to formally disclose information regarding the packaging of the seized cocaine because, as his own affidavits conclusively establish, petitioner has always been fully aware of those facts. The Court therefore finds that the outcome of the December, 1983

pretrial suppression hearing in this matter would have been the same even if the

government's duty to disclose had then been subject to the materiality standard set forth in Bagley. Since he cannot show the outcome of the pretrial suppression hearing would have been different if he had been provided with discovery under Bagley, petitioner cannot establish any actual prejudice. See e.g. Murray, 477 U.S. at 494 (Prisoner must show errors "worked to his actual and substantial disadvantage ....1"); United States v. Frady, 456 U.S. 152, 169-75 (no actual prejudice where prisoner did not show that error in jury instructions infected his entire trial).

The Court finds petitioner has not shown either adequate cause for his failure to previously raise his second claim, or actual prejudice stemming from that claim. Petitioner's second claim should therefore be denied as abusive within the meaning of § 2255, Rule 9(b) of the Rules Governing § 2255 Proceedings, and McCleskey.

IV. Merits of Second Claim

Even if petitioner were able to make an adequate showing of cause and prejudice, his second claim would fail on its merits for several reasons. First, as discussed above, the Supreme Court has never imposed a constitutional duty upon the government to disclose information which is already available to a defendant. See Bagley, 473 U.S. at 675 (reiterating that prosecutor is not required to deliver his entire file to defense counsel); see also United States v. Williams, 902 F.2d 678, 681-82 (8th Cir. 1990) (no Brady violation where defendant was free to subpoena his own telephone

records). Here the government did not breach its duty to disclose under Brady, Bagley or any other case.

Secondly, the Court is not persuaded that Bagley even announced a 'new rule' as that term is explained in Teague:

> It is admittedly difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what

> may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States of the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Teague, 489 U.S. at 301 (citations omitted). Bagley held that the same standard of materiality (which was developed in Brady, Agurs and Strickland v. Washington, 466 U.S. 668 (1984)) would be used in all instances to determine whether the government had a duty to disclose information to the defense. See Bagley, 473 U.S. at 682. In light of the extensive existing precedent regarding the prosecutor's duty to disclose favorable evidence, Bagley did not break any new ground or impose a new duty on the government. The Bagley case is properly viewed as an inevitable refinement of the law of criminal discovery, not a 'new rule'.

Finally, the Court does not believe the government the government has a constitutional duty under Brady or Bagley to disclose information that is only relevant to a fourth amendment claim. Brady established the government's duty to disclose evidence "favorable to an accused ... where the evidence is material either to guilt or to punishment ..." Brady, 373 U.S. at 87. Thus, there is no

question that the government must disclose evidence which is exculpatory because it tends to show the defendant is in fact innocent of a charged offense, or evidence which could impeach a government witness at trial. Such information is material and subject to disclosure precisely because it is highly likely to affect the decision by the trier of fact. See Bagley, 473 U.S. at 681-82. As the Court has noted, however, questions of whether evidence should be suppressed under the exclusionary rule are

of an entirely different nature since they bear only tangentially upon the ultimate finding of guilt or innocence. Accordingly, fourth amendment claims are susceptible to determination by the Court prior to trial, rather than by the jury. See Rule 12(b) (3), Ped.R.Crim.P. Consequently, the government's duty to disclose information to the defense in connection with such pretrial proceedings is not governed by either Brady or Bagley. See Rules 12(d) and (i), and 26.2(a), Fed.R.Crim.P.; see e.g. Franks v. Delaware, 438 U.S. 154, 155-56 (1978) (defendant must make "substantial preliminary showing" of false statement in search warrant affidavit before a hearing is required into veracity of the affidavit). The Court has been unable to find any case which applies Brady to a pretrial suppression hearing.

Petitioner's second claim therefore fails on its merits.

V. Amendment to Third § 2255 Motion

On March 20, 1991, petitioner amended his motion by adding a claim that he was denied the right to testify at the 1983

suppression hearing. See Amendment, Docket No. 184, at 6-7. Petitioner contends he did not realize he had such a right until he read several cases in February, 1991. Id. at 6. Petitioner's ignorance of this potential claim does not constitute cause for his failing to raise it earlier. See McCleskey, 111 S.Ct. at 1472. Petitioner's attempt to raise this claim now constitutes an abuse of the writ, and the claim should therefore be denied.

VI. Motion for Reconsideration of First § 2255 Motion

Petitioner has also filed a motion for "reconsideration" of this Court's denial in July, 1987 of his first § motion. See Motion, Docket No. 177. The focus of the motion is petitioner's continuing disagreement with the Court's factual finding that "the record indicates at least

some of the cocaine was in plain view rather than in closed and opaque containers." Memorandum Opinion and Order, Docket No. 139, at 7. Petitioner has had ample opportunity to seek review of this find. See Larson, 833 F.2d at 759 (appeal from denial of first § 2255 motion); see also Larson, 905 F.2d at 221 (noting that the finding was reaffirmed by this Court in denying petitioner's second § 2255 motion). Petitioner's motion for "reconsideration" is extraordinarily untimely. See Rule 60(b), Fed.R.Civ.P. The motion is also indistinguishable from the fourth claim of petitioner's third § 2255 motion, which the Court has found to be procedurally barred as successive. The motion for reconsideration should therefore be denied.

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VII. Motions for Discovery

Petitioner filed various motions to obtain discovery from the government. See Docket Nos. 176, 178-182, 189, 190 and 192.

In light of the Court's recommended disposition of this matter, these motions are now moot.

VIII. Motion for Evidentiary Hearing

Petitioner also filed a motion for an evidentiary hearing. See Motion, Docket No. 191. The Court has determined from the files and records of this case that petitioner is not entitled to relief as a matter of law. Accordingly, no evidentiary hearing is required. See Townsend v. Sain, 372 U.S. 293, 309 (1963); Rule 8(a), § 2255 Proceedings.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that Petitioner's third motion for relief under 28 U.S.C. § 2255 (Docket No. 175) and his motion for reconsideration (Docket No. 177) be denied.

FLOYD E. BOLINE
UNITED STATES MAGISTRATE JUDGE

Dated: December 23, 1991

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5171

Duane Wendall Larson, *
*
Appellant, *
*
v. *
*
United States of America, *
*
Appellee. *
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Submitted: February 12, 1990

Decided: June 6, 1990
Rehearing and Rehearing En
Banc Denied 7-25-90

Before WOLLMAN, MAGILL and BEAM, Circuit Judges.

BEAM, Circuit Judge.

Duane Wendall Larson appeals from the district Court's dismissal of his second petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 (1988). Because we find that Larson's second petition is successive and that the district court's denial of Larson's first

petition was a determination upon the merits, we hold that the district court should have given controlling weight to its denial of Larson's first petition, and dismissed the second petition for that reason. Accordingly, we affirm.

I. BACKGROUND

Larson was convicted in 1984 of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) (1988), and of aiding and abetting such action, 18 U.S.C. § 2 (1988), after a police search of a motel room occupied by Larson yielded three pounds of cocaine. For a complete recitation of the facts surrounding Larson's conviction see United States v. Larson, 760 F.2d 852, 853-55 (8th Cir.), cert. denied, 474 U.S. 849, 106 S.Ct. 143, 88 L.Ed.2d 119 (1985). On direct appeal of his conviction, Larson argued, in part, that the cocaine seized in the motel room should have been suppressed because the seizure violated his fourth

amendment rights. We found that Larson had no legitimate expectation of privacy in the motel room, and affirmed the district court's denial of the suppression motion.

Larson then filed his first habeas petition pursuant to section 2255. He argued, for the first time, that the cocaine found in the motel room should have been suppressed because it was in sealed containers that could not be searched without a search warrant. Larson also argued that he received ineffective assistance of counsel because his lawyer failed to raise this argument. The district court denied this petition, and this court affirmed. Larson v. United States, 833 F.2d 758 (8th Cir. 1987), cert. denied, 486 U.S. 1008, 108 S.Ct. 1736, 100 L.Ed.2d 200 (1988). We found that because he had not raised it below, Larson's fourth amendment claim was procedurally barred absent a showing of cause and actual prejudice. Because the district court had

found that some of the cocaine was in plain view, the fourth amendment argument was without merit. Accordingly, Larson could prove no prejudice. Since the fourth amendment claim was without merit, so was the ineffective assistance claim; it cannot be ineffective assistance not to raise a meritless argument. Larson, 833 F.2d at 759.

In his section 2255 petition, Larson raises the same ineffective assistance claim, based on the same fourth amendment sealed container argument. In addition, however, Larson now offers his own

affidavit, and that of a private investigator who interviewed several witnesses, as proof that the district court erred in finding that some of the cocaine was in plain view. Larson argues that this is new evidence, and that he is entitled to an evidentiary hearing on the matter.

[1] In reviewing Larson's second petition, the United States Magistrate found that the district court's denial of Larson's first petition could not be the basis for dismissal under Rule 9(b) of the Rules Governing Section 2255 Cases in the District Courts. The district court did not hold an evidentiary hearing on the factual issue of whether the cocaine was in sealed containers when it considered the first petition. Thus, the magistrate found that the details of the first petition was not "on the merits," as required by Sanders v. United States, 373 U.S. 1, 15,83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963), if the denial of the first petition were to be the basis for dismissing the second petition as successive. The magistrate instead considered the second petition on the merits. He concluded that, even if the facts alleged by Larson were true, the fourth amendment motion to suppress would not have been successful. The search would

still have been valid because, among other reasons, some of the cocaine was in plain view. Thus, the sixth amendment claim of ineffective assistance lacked merit, and the magistrate recommended that the second petition be dismissed. The district court adopted the magistrate's report and recommendation, and dismissed Larson's second petition.

On appeal, Larson argues that the district court's finding that some cocaine was in plain view, made in the district court's consideration of Larson's first petition, is clearly erroneous, that the district court in its consideration of the second petition so held, and that he is entitled to an evidentiary hearing. We think that Larson ignores the procedural disposition of this case. Larson's second petition is clearly a successive petition that should have been dismissed under the criteria set forth in Sanders. The district court's denial of Larson's first

petition is entitled to be give controlling weight, and the second petition was, therefore, properly dismissed.

II. DISCUSSION

In Sanders, the Supreme Court set forth the consideration which a district court must give to a successive habeas petition under either section 2254 or section 2255. Sanders held that controlling weight may be given to the district court's denial of a prior habeas petition if: "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." Sanders, 373 U.S. at 15, 83 S.Ct. at 1077. These criteria were substantially codified in the enactment of 28 U.S.C. § 2254(b), dealing with state prisoners, and in Rule 9(b) of the Rules

Governing Section 2255 Cases in the United States District Courts. Rules 9(b) provides that a successive petition may be dismissed if the court "finds that it fails to allege new or different grounds for relief and the prior determination was on the merits." In its consideration of Larson's second petition, the district court concluded, as indicated, that it could not dismiss the petition as successive because its prior determination was not "on the merits." We disagree.

In his report and recommendation, the magistrate concluded that the district court's denial of Larson's first petition was not on the merits because the district court did not hold an evidentiary hearing. Report and Recommendation at 6. Sanders does not, however, provide that a prior determination is on the merits only if a hearing is held. Rather, the district court may deny the first petition "on the basis that the files and records

conclusively resolved" the factual issues raised. Sanders, 373 U.S. at 16, 83 S.Ct. at 1077. Even though the district court did not hold an evidentiary hearing on the first petition, we think that its prior determination was nonetheless on the merits.

[2,3] A district court need not hold an evidentiary hearing if the facts alleged,

taken as true, would not justify relief. United States v. Kraemer, 810 F.2d 173, 178 (8th Cir. 1987). "An evidentiary hearing is not required in a section 2255 case where the files and records of the case conclusively show that the petitioner is not entitled to relief." United States v. Schmitz, 887 F.2d 843, 844 (8th Cir. 1989). See also United States v. Johnson, 751 F.2d 291, 294 (8th Cir. 1984), cert. denied, 471 U.S. 1126, 105 S.Ct. 2659, 86 L.Ed.2d 275 (1985). Nor does Sanders somehow change

the criteria for determining whether a district court must hold an evidentiary hearing. Sanders says only that the prior determination must be on the merits to be given controlling weight. There is no requirement that a district court must conduct an evidentiary hearing if the record is sufficient without it. Thus, we have held that the district court's denial of a prior habeas petition was on the merits even though the court did not hold an evidentiary hearing. See, e.g., Williams v. Lockhart, 862 F.2d 155, 157 (8th Cir. 1988).

Larson's first habeas petition in this case was denied by the same district judge who presided at trial. The district court made a factual finding in its review of the first habeas petition that some of the cocaine seized was in plain view. Larson admits that he argued that this finding was clearly erroneous in his appeal to the Eighth Circuit. Brief for Appellant at 2.

On appeal, we upheld the district court's finding, and thus concluded that Larson's fourth amendment argument was without merit. Larson, 833 F.2d at 759. Given the district court's finding from the trial record and this court's conclusions on appeal, the district court was not required to conduct an evidentiary hearing in this matter.

Larson further argues, however, that he is entitled to an evidentiary hearing because the district court in its dismissal of his second petition concluded that its factual findings in the first habeas were clearly erroneous. Brief for Appellant at 2,7. Larson misconstrues the magistrate's report and recommendation, adopted by the district court. The magistrate merely held that "[f]or the purpose of determining the merit of such a suppression motion," he would accept Larson's factual allegations as true. Report and Recommendation at 12. In no way is this a finding that the

district court was clearly erroneous in its earlier finding that some cocaine was in plain view. Indeed, the magistrate found that "the files and records in this case conclusively show that the paper bags were not sealed, [and] that all the cocaine was [not] inside opaque containers." Id. at n. 3. Thus, Larson is not entitled to an evidentiary hearing on the ground that the district court has admitted error.

[4] Nor is Larson entitled to an evidentiary hearing because he presents newly discovered evidence relevant to the fourth amendment argument. Larson's evidence, consisting of his own affidavit and the conclusions of a private investigator, is simply not new. Anything asserted here was within Larson's knowledge at the time he filed his first habeas petition. Even if Larson's evidence were new, he would not be entitled to relief. Newly discovered evidence cannot be the basis for habeas relief absent a showing

that it "would probably produce an acquittal on retrial." Dumond v. Lockhart, 885 F.2d 419, 421 (8th Cir. 1989) (quoting Mastrian v. McManus, 554 F.2d 813, 823 (8th Cir.) cert. denied, 433 U.S. 913, 97 S.Ct. 2985, 53 L.Ed.2d 1099 (1977)). Larson has not made such a showing and, for the reasons stated by the district court in its denial of his second petition, Larson can make no such showing.

III. CONCLUSION

Accordingly, we hold that the district court's denial of Larson's first habeas petition should have been given controlling weight by the district court. Its prior determination was on the merits as required by Sanders. Thus, Larson argues only that the district court was initially incorrect in its finding that some of the cocaine was in plain view -- a finding already established in the appeal of Larson's first habeas petition. "Something more than mere disagreement [with the previous habeas

court] must be shown to justify a successive habeas petition." Williams, 862 F.2d at 158 (quoting Walker v. Lockhart, 726 F.2d

1238, 1250 (8th Cir.) (en banc) (Arnold, J., concurring), cert. dismissed, 468 U.S. 1222, 105 S.Ct. 17, 82 L.Ed.2d 912 (1984)). Here, Larson does no more than disagree with the previous habeas court. As a result, we affirm the judgment of the district court dismissing Larson's successive habeas petition.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

DUANE WENDALL LARSON,

Petitioner, Civil 4-88-750

vs.

UNITED STATES OF AMERICA,

Respondent. ORDER

On January 13, 1989, United States Magistrate Bernard P. Becker issued a Report and Recommendation. He recommended that petitioner's successive section 2255 application be dismissed. Subsequently petitioner filed an objection with multiple exhibits. The government has submitted a response to his objections. Petitioner also moved to remand to the magistrate for reconsideration in light of additional evidence.

The court is most familiar with this case, having presided at trial and over petitioner's previous petition. The court has carefully reviewed petitioner's

objections and made a de novo review of the record as to them. The court has also considered the points made in petitioner's motion. After the court's de novo review and consideration of all the points raised, it finds itself in basic agreement with the findings and conclusions of Magistrate Becker. Further, the court is not persuaded that a remand is warranted.

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

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1.) Petitioner's successive section 2255 petition is dismissed.

2.) Petitioner's motion to remand to the Magistrate for reconsideration is denied.

Dated: February 23, 1989

DIANA E. MURPHY
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

DUANE WENDALL LARSON,
#01786-041-I,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 4-88-750
Cr. 4-83-84(1)

R E P O R T &
RECOMMENDATION

FRANCIS L. GOODWIN, Esq., appeared on behalf of the petitioner.

RICHARD E. VOSEPKA, Esq., Assistant United States Attorney, appeared on behalf of the respondent.

BERNARD P. BECKER, United States Magistrate

This matter is before the undersigned United States Magistrate on petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 and on his motion for an evidentiary hearing. This case has been referred to the undersigned for Report and Recommendation pursuant to 28 U.S.C. § 636 and Local Rule 16.

I. PROCEDURAL HISTORY

Petitioner, Duane Wendall Larson was

convicted and sentenced on a count of an indictment charging him with possessing cocaine with intent to distribute and aiding and abetting in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The conviction was appealed. United States v. Larson, 760 F.2d

852 (8th Cir.), cert. denied, 474 U.S. 849 (1985). In 1986, petitioner filed his first 28 U.S.C. § application. He alleged six separate grounds for relief, three of which he argued on appeal to the Eighth Circuit. See Larson v. United States, 833 F.2d 758 (8th Cir. 1987). One of the three issues he argued on appeal was that

> [H]e received ineffective assistance of counsel from one attorney who failed to object to the admission of evidence obtained in the search of a bags and from another attorney who advised him not to participate at trial.

Id. at 758-759.

In his first section 2255 motion before the Honorable Diana E. Murphy,

United States District Court for the District of Minnesota, petitioner alleged that he received ineffective assistance of counsel because his attorney, Mr. Smith, failed to raise a suppression motion relative to the alleged illegal seizure of cocaine inside of closed containers. In arguing the substance of his Fourth Amendment claim, petitioner stated in his first petition that "it became abundantly apparent [during the trial] that the cocaine was sealed in packages and concealed from view." Magistrate Boline Report and Recommendation at 13. In his affidavit, petitioner stated that he had informed his defense attorneys that the cocaine was "enclosed in paper bags and also in manila envelopes or small paper bags inside the large bag." See Judge Murphy, Order dated July 2, 1987, at 11. But the district court found that "not all the cocaine was

contained in opaque packaging and that at least some of the cocaine was visible to the hotel manager when he looked around the room." Id. Relative to the Sixth Amendment claim, the Magistrate recommended, and the Court concluded, that it was significant that the "petitioner chose not to participate with his attorney at trial in the attempt to suppress the evidence." Id. the Magistrate noted that:

> Larson instructed Smith, who was instructed by the Court to act as "stand-by" counsel, not to take any part in the proceedings. Larson cannot now complain that he was denied effective assistance of counsel because Smith followed his instructions.

Magistrate Boline Report and Recommendation at 22. Finally, the Magistrate reported that the container search issue "cannot alone be regarded as a professional unreasonable error" because

> [i]t is clear from the circumstances of the search, and from Larson's own statement of facts in his 2255 motion, that he was more intimately familiar with the location and packaging of the cocaine and the other evidence

> than the other witnesses. . . . If Attorney Smith was unaware until midway through the trial that the cocaine was concealed inside sealed envelopes, his ignorance can only be attributed to Larson's failure to inform him of that fact. (cites) Larson has not alleged that he even informed Attorney Smith of these facts, which would be crucial to the viability of a suppression motion based on an illegal container search.

Id. at 21.

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The petitioner's application for section 2255 relief was denied by the district court and affirmed on appeal. Larson, 833 F.2d 849. Petitioner now files a second application for section 2255 relief, alleging a violation of his Sixth Amendment right to effective assistance of counsel because his attorney failed to file a motion to suppress cocaine found in closed containers. Petitioner also moves the Court to hold an evidentiary hearing on this issue. Specifically, petitioner alleges that the hotel manager did not see any cocaine when he first inspected the

room and that he saw only sugar-based substances. Petitioner argues that this information proves that the cocaine seized from the search of his motel room was all in closed containers.

II. DISCUSSION

A. Petitioner's Motion to Re-Litigate Issues Decided in a Prior Section 2255 Application

The issue presented to this Court, i.e., that petitioner has been denied effective assistance of counsel for failure of his attorney to raise the closed container suppression issue, has already been litigated and decided by a court.[1] Furthermore, the issue has been reviewed by the Eighth Circuit Court of Appeals.[2] This Court is not required to

entertain a successive motion under section

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[1] Judge Diana E. Murphy, United States District Court for the District of Minnesota. See Order dated July 2, 1987 (Docket entry 139).

[2] Larson v. United States, 303 F.2d 758 (8th Cir. 1987).

2255. Rule 9(b) of the rules governing section 2255 proceedings in the United States District Courts states:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

The statute itself, 28 U.S.C. § 2255, provides, in part: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

In Sanders v. United States, 373 U.S. 1 (1962, the Supreme Court set forth the conditions which must exist when a court may give "controlling weight" to a denial of a prior application for section 2255 relief. A court may give controlling weight to a previous denial and not hold a

hearing or decide the successive petition on the merits

> [O]nly if 1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, 2) the prior determination was on the merits, and 3) the ends of justice would not be served by reaching the merits of the subsequent application.

Id. at 15. All three of the enumerated factors must be present before a successive petition may be dismissed without a hearing

a review of the claim on the merits. William v. Lockhart, 1988 U.S. App. LEXIS 15351 (Nov. 17, 1988).

Regarding the first condition, petitioner herein has asserted the same ground presented in the previous application, which was determined adversely to him at that time. According to the Sanders court, an identical ground may be proven by different factual allegations. Here, the petitioner alleges additional evidence relative to what the hotel manager

saw. These facts were not alleged in the previous application for relief, but it is clear petitioner is alleging the same "ground" for relief, i.e., the Sixth Amendment claim.

The second condition imposed by Sanders requires that the prior determination was made on the merits. The Sanders court explained "on the merits" as meaning "that if factual issues were raised in the prior application . . . an evidentiary hearing was held." Id. at 16. Here, no evidentiary hearing was held on the initial application for relief, even though petitioner alleged a factual issue, i.e. that all the cocaine admitted against him at trial was found in closed containers. The district court found that the trail record revealed that some of the cocaine was in plain view of the hotel manager and that not all of the cocaine was in opaque packaging. Under the procedural history of this case, this condition of

Sanders cannot be met.

Third, the petitioner must show that the ends of justice would be served by permitting a redetermination of the

issue. In Williams v. Lockhart, 1988 U.S. App. LEXIS 15351 (November 17, 1988), the Eighth Circuit suggested that a petitioner should present new facts or legal developments in order to warrant re-litigation of the claim under Sanders. Id. at 8.

In 1986, the Supreme Court re-examined the standards governing successive habeas petitions. Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality opinion). A plurality of the justices determined that under the "ends of justice standard," "courts may consider whether there is a colorable claim of factual innocence when presented with a successive petition containing claims previously rejected on the merits." Williams, LEXIS at 8. In

Williams, the Eighth Circuit found it unnecessary to reach the issue of whether Walker was able to make a colorable showing of factual innocence because he presented no new facts or legal developments which warranted re-litigation of the claim under Sanders. In adopting the standard proposed by Judge Friendly a decade before, the Kuhlman court said,

> A requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration. We adopt this standard now to effectuate the clear intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require. The prisoner may make the requisite showing by establishing that under the probative evidence he has a colorable claim of factual innocence. The prisoner must make his evidentiary showing even though--as argued in this case--the evidence of guilt may have been unlawfully admitted.
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477 U.S. at 454. In a footnote, the court explained that a prisoner does not make a

colorable showing of innocence,

> [b]y showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained. (cites) Rather, the prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted. . . and evidence tenably claimed to have been wrongly excluded or to have become available only after the trail, the trier of the facts would have entertained a reasonable doubt of his guilt.' (cites) Thus, the question whether the prisoner can make the requisite showing must be determined by reference to all probative evidence of guilt or innocence.

Id., footnote 17 (emphasis added).

Mr. Larson has made no colorable showing of factual innocence here. "Almost three pounds of pure cocaine were seized and other evidence of drug trading was present in the searched room occupied by Larson." Larson, 833 F.2d at 759. While the petitioner argues that the cocaine should have been suppressed and thus attempts a showing of legal innocence, there is no

basis for the suggestion that the "trier-of-the-facts would have entertained a reasonable doubt of his guilt" in light of all the evidence.

Because all three of the enumerated conditions cannot be met, this Court cannot dismiss petitioner's claim under Sanders. Rather, than give controlling weight to the initial

section 2255 denial, petitioner's case must be reviewed as if before the Court for the first time.

B. Motion for Evidentiary Hearing and Merits of Claim

Petitioner has moved the Court to hold an evidentiary hearing pursuant to 28 U.S.C. § 2255. That section provides in part:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make

> findings of fact and conclusions of law with respect thereto.

The Eighth Circuit has said,

> [a]n evidentiary hearing on a section 2255 motion must be granted when the facts alleged would justify relief if true, or when a factual dispute arises as to whether or not a constitutional right is being denied.

Smith v. United States, 618 F.2d 507,510 (8th Cir. 1980); United States v. Kraemer, 810 F.2d 173, 178 (8th Cir. 1987).

Because the statute requires that this Court assess the merits of petitioner's claim in order to decide petitioner's motion for an evidentiary hearing, the merits of his claim will be discussed at this time. Review of the merits is also necessary because, under Sanders, this Court may not give controlling weight to the sentencing court's disposition of petitioner's first section 2255 application.

Here, petitioner claims that he has

been denied his Sixth Amendment right to effective assistance of counsel because his pre-trial attorney, Mr. Smith, failed to move to suppress the search and seizure of certain closed containers containing cocaine. This claim, if true, must have merit in order to justify holding an evidentiary hearing. In order for this claim to have merit, petitioner must meet the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). In order to prevail, a defendant must show both 1) that counsel's representation fell below an objective standard of reasonableness and 2) that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 688, 694. More recently, the Supreme Court in Kimmelman v. Morrison, 477 U.S. 365 (1986), explained the correct standard to apply when an attorney's incompetence is founded upon a failure to make a Fourth Amendment

claim.

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Id. at 375.

The Eighth Circuit has adopted substantially the same standard. "The prejudice flowing from an attorney's failure to file a suppression motion is determined by examining the likely

success of the motion." Kellogg v. Scurr, 741 F.2d 1099, 1104 (8th Cir. 1984); United States v. Johnson, 707 F.2d 317, 320 (8th Cir. 1983). In United States v. Johnson, the Eighth Circuit opined that "[t]he failure to make a motion to suppress what is essentially the only evidence against a defendant can be sufficient to establish lack of diligence on the part of the

attorney if the motion would have succeeded." 707 F.2d 317, 320 (8th Cir. 1983), citing, United States v. Easter, 539 F.2d 663 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977).

Thus, the issue before this Court on petitioner's motion for an evidentiary hearing, is to determine whether a motion to suppress the cocaine, if it had been made, would have been successful. If the suppression motion would have been successful and if petitioner's attorney was so lacking in professional competence as to deny him effective assistance, and thus, a fair trail, then petitioner's application for relief has merit and an evidentiary hearing should be held.

On review before the Eight Circuit, the court surveyed the findings and conclusions of the district court in petitioner's first motion under section 2255:

> The district court found some of the seized drugs in the grocery

> bags were in plain view, and some were obtained during a police search that followed a private search conducted by the owner of the premises. Thus, the search of the bags challenged by Larson was not invalid under the Fourth Amendment.

Larson, 833 F.2d at 759. In this petition, Mr. Larson's second section 2255 application, petitioner asserts facts which might prove two theories: 1) that the police search exceeded the scope of the private search and 2) that the seized drugs were not in plain view of the owner of the premises, i.e. the hotel manager who did the private search, and, by implication, they were not in plain view of the police when they searched the premises. For the purpose of determining the merit of such a suppression motion, this Court will accept as true petitioner's factual allegations relative to what the hotel manager

observed.[3]

The search of the hotel room could be legitimate under any of several theories: 1) because the rental period of the hotel room had expired, petitioner lacked an expectation of privacy in the room 2) the custodian of the premises gave consent to the police to search the room; 3) exigency justified the warrantless entry and search; 4) the cocaine was in plain view when the police came in; or 5) a private search of the room legitimized the later police search. First, the private search

of the motel room. Petitioner's

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[3] Petitioner also asserts, as he did in his first section 2255 application, that all the cocaine was in sealed containers and thus should have been suppressed. Petitioner asserts no new facts to convince the Court that the grocery bags were sealed or that the cocaine was in opaque packaging. See United States v. Mefford, 658 F.2d 588, 591-92 (8th Cir. 1981), cert. denied, 455 U.S. 1003 (1982). Besides, the files and records in this case conclusively show that the paper bags were not sealed, nor that all of the cocaine was inside opaque containers. A hearing will not be held to delve into the closed container issue.

allegations as to what the hotel manager saw in his private search of the hotel room does not differ in a material way with the testimony at trial. At trial, the hotel manager testified that he saw two paper bags on a table. One paper bag had liquor bottles in it, while the other paper bag had two plastic bags of white powder contained within it. T.T. II at 307, 310-312. The new facts alleged by the petitioner clarify that what the hotel manager saw in the room was probably a non-drug substance and not cocaine. But there was no evidence at trial that what the hotel manager saw was indeed cocaine. To the contrary, the hotel manager's description at trial of the two plastic bags filled with white powder in the grocery bag comports with Officer Clark Holden's description at trial of Government Exhibits 6, 7, and 8, which were later identified as sugar-based substances. T.T. III at 527. None of the other grocery bags

filled with plastic bags and/or manila envelopes containing cocaine fit the description given by the hotel manager at the trial. The hotel manager saw in the only grocery bag which had two zip lock plastic bags inside. None of the other bags fit this description. Thus, a determination that the private search legitimized the police search would be no different under the facts alleged now by petitioner. Thus, what this discussion proves is that a private search could not support the police search under either the evidence adduced at trial or the "new facts" put forth by petitioner. On the facts, the private search was simply too

limited in scope to legitimize the scope of the police search. See United States v. Jacobson, 466 U.S. 109 (1984).

Second, the plain view doctrine supports the search. At trial, the hotel manager testified that when he first

noticed the grocery bags containing the white powder, they were on a table in the hotel room. At that time, no one was in the room. Between the time the hotel manager was in the room and the time the police arrived, the furniture arrangement had been slightly changed. In particular, the table had been moved and the grocery bags were no longer on the table. At the time of the search by the police, there was a grocery bag on the sink in the bathroom (Government Exhibits 1, 2 and 3), one under the TV (Government Exhibit 4), a plastic bag of white powder on the bed under the bedspread (Government Exhibit 5), a grocery bag with two zip lock plastic bags of powder and a plastic cup inside located on top of the bed (Government Exhibits 6, 7 and 8), and a paper bag containing one plastic bag of white powder under the TV (Government Exhibit 9). There was no evidence at trial that the paper grocery bags (containing the bags and envelopes of

white powder) were sealed in any manner. There is no expectation of privacy in a paper bag not sealed with tape, staples, or string. United States v. Mefford, 658 F.2d 588, 591-592 (8th Cir. 1981), cert. denied, 455 U.S. 1003 (1982). Further, there was no evidence that the manilla envelopes which contained white powder and which were inside the paper grocery bags were sealed. All the plastic bags containing cocaine were

transparent, so that the cocaine could be seen without unsealing the zip lock plastic bag. See Robbins v. California, 453 U.S. 420 (1988) (plurality opinion) (contents of transparent container could be said to be in plain view).

The petitioner provides the Court with no factual allegations that the packages containing the cocaine were sealed and hidden from plain view. the facts before the Court on this issue are the same as

those before Judge Murphy on the initial section 2255 motion and at trial. No new evidence has been presented to disprove the view that evidence was in plain view during the search by the police. All that the petitioner alleges is that the hotel manager saw only sugar-based substances and no cocaine. First, this piece of information has absolutely nothing to do with what was in plain view <u>when the police searched the room</u>. Even if the undersigned accepts as true petitioner's allegation as to what the hotel manager saw, it does not alter, under the plain view doctrine, what the police saw. Second, at least one of the grocery bags and the table on which it sat had been moved between the time that the hotel manager saw the room and when the police arrived and searched the room. Thus, what the hotel manager saw is not relevant to what was in the room and in plain view when the police arrived. The inference that the hotel manager and the

police saw the same items in plain view cannot be supported.

Third, the search of the room can be justified under the exigent circumstances doctrine.[4] As an initial matter, the police had probable cause to believe that contraband was located in the motel room. See Illinois v. Gates, 462 U.S. 213 (1983). Hotel personnel had examined the white powder in the grocery bag and suspected it was an illegal substance. They contacted the police. Further, the trial transcript revealed that the police, upon arriving at the hotel and after notifying the room's occupant that they had arrived and wanted to speak to him, heard some rustling noises inside the room before the defendant answered the door. Given that the police

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[4] This Court is not required to reconsider this issue, since the Eighth Circuit reviewed it on direct appeal. 760 F.2d at 855. See Kraemer, 810 F.2d at 177 (petitioner cannot raise the same issues in a section 2255 petition as he did on direct appeal). The following discussion reiterates the findings of the Eighth Circuit.

suspected drug trafficking, the noise of moving around inside the room would lead a reasonable police officer to assume that evidence was being destroyed. Under the totality of the circumstances, probable cause and exigency existed to enter the room without a warrant. See Larson, 760 F.2d at 855.

Fourth, hotel personnel consented to the search of the motel room and petitioner Larson had no expectation of privacy in the room after the rental period expired.[5] Co-defendant Sheila Burgess rented the motel room on October 28, 1983. She paid for the room in advance. The next morning, she checked out but asked if her co-occupant could remain in the room until two o'clock, two hours after the normal check-out time. After two o'clock, a maid was informed by petitioner that he wished to stay another night. At approximately 5:30 p.m., when no

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[5] See previous footnote. This issue was litigated on direct appeal.

additional rent had been paid for the room and several long distance phone calls still remained unpaid, a bell person was sent to the room to check out the situation. It was reported to the hotel manager that the room was unoccupied. At that point, the hotel manager went to the room and inspected it after finding no one there. He discovered empty liquor bottles in a bag, prescription pills, keys and grocery bags containing plastic bags filled with white powder. 760 F.2d at 855. He called the police. The police arrived at 6:40 p.m. Apparently around 7:00 p.m., the hotel manager went to the room and knocked whereupon a voice answered and the manager and the petitioner had a conversation through the closed door. Then the police knocked on the door and after hearing some noises from within, petitioner stepped out of the room, closing the door behind him. Petitioner refused to let the officers enter the room and the hotel manager

consented to the entry of the police into the room. Id.

The issue at this point is whether the hotel manager had the power to consent to a search of a room occupied by the petitioner. Where the term a guest's occupancy of a room expires, a guest loses his exclusive right to privacy in the room. At that point, hotel personnel have the right to enter

the room and consent to a search and seizure of items there found. See Larson, 760 F.2d at 855, citing United States v. Parizo, 514 F.2d 52, 54 (2nd Cir. 1975). See also United States v. Croft, 428 F.2d 884 (10th Cir. 1970). "When the rental period has elapsed, the guest has completely lost his right to use the room and any privacy associated with it." Id.; Croft, 429 F.2d at 887. It is a defendant's burden of proving that he has a legitimate expectation of privacy in a room

at the time of the search. See Rawlings v. Kentucky, 448 U.S. 98, 104-105 (1980); Rakas v. Illinois, 439 U.S. 128, 131 n. 1 (1978); Larson, 760 F.2d at 854. Here, petitioner stayed beyond the occupancy period without paying for another day. Although he had informed the maid that he wished to stay another day, he had failed to comply with the motel's policy that persons pay for their room in advance. The petitioner simply failed to meet his burden that he had an expectation of privacy in the room. Thus, the hotel was clearly within its rights to consent to a search of the room. Given the lack of privacy by Larson in the room and the consent to search, a search of those items found in the room was therefore permissible.

The search of the motel room can be justified on the basis of several legal theories. Given the fact that the petitioner offers no new evidence that would support a successful suppression

motion, it is obvious that petitioner cannot claim ineffective assistance of counsel on this basis. See Johnson, 707 F.2d at 323.

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Further, petitioner offers no factual allegations which undermine the competency of his attorneys at trial. His factual assertions only go to what the hotel manager saw. As discussed, this information does nothing to undermine the validity of the motel room search and the resultant admissibility of the cocaine into evidence. Thus, under Strickland, petitioner cannot meet a prong of the two-part test. In order for his claim of ineffective assistance of counsel to have merit, petitioner must also show under Strickland that his legal representation fell below an objective standard of reasonableness. This Court finds it significant that Mr. Larson had three attorneys working on his case, one of whom

worked strictly on suppression-type motions. That attorney, Mr. Smith, worked on petitioner's case for 400 hours. This Court finds it wholly improbably that Mr. Smith fell below an objective standard of reasonableness.

Petitioner's motion for an evidentiary hearing is denied. If petitioner's factual allegations relative to the hotel manager are taken as true, a review of petitioner's claim of ineffective assistance of counsel has no merit. This Court is not required to hold an evidentiary hearing on a meritless claim. Further, the files and records conclusively show that Mr. Larson is entitled to no relief on this claim. Therefore, his claim should be dismissed on the merits.

Based on the foregoing, and all the files, records and proceedings herein.

IT IS HEREBY RECOMMENDED that petitioner's successive section 2255 application be DISMISSED.

DATED: January 13, 1989.

BERNARD P. BECKER
United States Magistrate

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5307

Duane Wendall Larson,	*	
	*	
Appellant,	*	Appeal from
	*	the United
v.	*	States
	*	District
	*	Court
United States of America	*	for the
	*	District of
Appellee.	*	Minnesota
	*	
	*	

Submitted: October 23, 1992

Filed: November 25, 1987

Before MCMILLIAN, FAGG, and BOWMAN, Circuit Judges.

PER CURIAM.

Duane Wendall Larson appeals pro se from the district court's order denying his petition for a writ of habeas corpus under 28 U.S.C. § 2255. We affirm.

Larson was convicted and sentenced on a count of an indictment charging him with possessing cocaine with intent to distribute

and aiding and abetting. See 21 U.S.C. § 841 (a)(1); 18 U.S.C. § 2. A full description of the facts relating to the offense is set fourth in this court's opinion affirming Larson's convictions. See United States v. Larson, 760 F.2d 852, cert. denied, 474 U.S. 849 (1985). Larson's habeas petition contained six separate grounds for relief, three of which he argues on appeal. Larson contends: (1) evidence contained inside paper grocery bags was illegally seized; (2) he received ineffective assistance of counsel from one attorney who failed to object to the admission of evidence obtained in the search of the bags and from another attorney who advised him not to participate at trial; and (3) his presentence investigation report (PSI) contains information improperly obtained from the grand jury. We conclude none of these contentions entitle Larson to habeas relief.

Larson did not raise the fourth

amendment claim challenging the warrantless police search of the paper grocery bags before or during trial. Thus, he is barred from raising the claim unless he can show cause excusing the procedural default and actual prejudice. United States v. Frady. 456 U.S. 152, 167-68 (1982); United States v. Johnson, 707 F.2d 317-320 (8th Cir. 1983). The district court found some of the seized drugs in the grocery bags were in plain view, and some were obtained during a police search that followed a private search conducted by the owner of the premises. Thus, the search of the bags challenged by Larson was not invalid under the fourth amendment. See United States v. Newton, 788 F.2d 1392, 1394 (8th Cir. 1986) (plain view doctrine); United States v. Jacobson, 466 U.S. 109, 113-15 (1984) (police search within scope of private search not a fourth amendment violation); United States v. Mefford, 658-F.2d 588, 591-92 (8th Cir. 1981) (no expectation of privacy in paper

bag not sealed with tape, staples, or string), cert. denied, 455 U.S. 1003 (1982). Because this underlying evidentiary claim is without merit, Larson has failed to demonstrate actual prejudice from the introduction of this evidence. See Johnson, 707 F.2d at 323.

In order to prevail on his claims of ineffective assistance of counsel, Larson must show the legal representation he received fell below an objective standard of reasonableness and that there is a reasonable probability, but for these unprofessional errors, the result of his trial would have been different. See Kimmelman v. Morrison, 477 U.S. 365, _____, 106 S. Ct. 2574, 2583, (1986); Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).

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First, in view of our conclusion Larsons' fourth amendment claim lacks merit, the failure of Larsons' counsel to raise the

issue does not constitute ineffective assistant. See Johnson, 707 F.2d at 323. Second, the advice of Larson's other counsel not to participate at trial will not support an ineffective assistance claim in the circumstances of this case. Almost three pounds of pure cocaine were seized and other evidence of drug trading was present in the searched room occupied by Larson. In addition, Larson had access to alternate counsel from whom he could have sought advice, and the district court repeatedly warned Larson he was waiving constitutional rights by voluntarily choosing not to participate. Under these conditions, Larson did not receive ineffective assistance of counsel.

Finally, Larson argues information in his PSI was improperly obtained from grand jury records. While both direct and indirect disclosure of grand jury material is prohibited, only information that reveals what transpired in the grand jury room is

protected from disclosure, and not all future revelations to proper authorities are foreclosed. See In re Grand Jury Matter, 682 F.2d 61, 63 (#d Cir. 1982). After reviewing the record, we conclude Larson's argument on this point is purely speculative and does not provide grounds for habeas relief.

We have thoroughly reviewed the record and Larson's contentions. We affirm the district court's denial of Larson's petition.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[TO BE PUBLISHED]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

DUANE WENDALL LARSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

Civ. 4-86-483
Crim. 4-83-84

Petitioner Duane W. Larson was convicted of one count alleging possession of approximately three pounds of essentially undiluted cocaine with intent to distribute and aiding and abetting. He was sentenced to ten years imprisonment and a $25,000 fine. His conviction was affirmed, after which he began to serve his sentence. United States v. Larson, 760 F.2d 852 (8th Cir.), cert. denied, 106 S. Ct. 143 (1985).[1]

Larson has petitioned for relief

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[1] Larson also pleaded guilty before the Honorable Edward J. Devitt to one count of tax evasion. A five year sentence was imposed, and he is now serving an aggregated sentence of fifteen years.

pursuant to 28 U.S.C. § 2255. He seeks to have his conviction vacated or, alternatively, to have his sentence and the presentence investigation corrected. United States Magistrate Floyd E. Boline recommended denial of all requests for relief with the exception of one issue on which he made no recommendation. The matter is now before the court on

- 1 -

Larson's objections to the Report and Recommendation and the government's response to them.

Petitioner's § 2255 submission consisted of six separate motions seeking various forms of relief. First, Larson asserted that his conviction was unlawful because it was based on illegally seized evidence. He then asserted that his conviction cannot stand because he was denied effective assistance of counsel by two attorneys. His third request was for a new trial "with counsel of his choice."

Fourth, he sought resentencing on a variety of grounds: Fed. R. Civ. P. 32(c)(3)(D), 48 U.S.C. § 4205(b)(2), the reversal of his codefendant's conviction, and possible reliance in sentencing on two prior convictions that should have been expunged from the record. Fifth, he claimed that the court relied on erroneous information about parole guidelines and therefore should reduce his sentence. Finally, he argued that his aiding and abetting conviction should be vacated because his codefendant's conviction was reversed. Magistrate Boline considered each of these arguments, but found none persuasive.

Larson obviously reviewed the Report and Recommendation carefully and submitted objections to the magistrate's findings and recommendations on all or part of the first, second, and fourth of his original claims. He explicitly did not object to the magistrate's rejection of the other three claims. Pursuant of Fed. R. Civ. P. 72(b),

the court has made a de novo determination of those matters to which objections were filed. In making

its de novo determination, the court has carefully studied petitioner's objections and his exhibits, as well as the entire record, including the thorough Report and Recommendation and the trial transcript. After this de novo review, the court finds itself in basic agreement with the magistrate on most issues. The court was obviously aided in review and consideration of the record by having presided at trial and the sentencing hearing.

Request for Evidentiary Hearing

Petitioner seeks an evidentiary hearing and Magistrate Boline found as a preliminary matter that there was no need for such a hearing. Section 2255 requires such a hearing "[u]nless the motion and the files and records of the case show conclusively

that the prisoner is entitled to relief," 28 U.S.C. § 2255. "[T]he decision as to whether a hearing is necessary to determine the factual contentions is committed to the discretion of the district court." Widgery v. United States, 796 F.2d 223, 224 (8th Cir. 1986).

The magistrate found the files and records an entirely adequate basis for determining the merits of all but one of Larson's claims. Larson now concedes that most of his claims can be resolved without a hearing. The "possible exception" identified by the magistrate, and emphasized by Larson, related to his claim that certain advice of attorney Oscar Goodman amounted to ineffective assistance of counsel.

In support of his objections, petitioner has filed his own affidavit, as well as one by his wife. They state Goodman confirmed in a June 1986 telephone call that he had advised petitioner not to participate

at trial if the court didn't grant a continuance because a new trial would result, at which Goodman would represent him.[2] Larson seeks an evidentiary hearing to bring this out. Such a hearing is not necessary, however, because for purposes of this petition, the court will take as true Larson's account of the advice given by attorney Goodman.

Fourth Amendment Claim

The three pounds of cocaine at issue in this case were seized in a search of a motel room. This search was described at trial and on appeal. 760 F.2d at 852. Larson's codefendant rented the room for a single night, paying in advance. She checked out the following morning, after obtaining permission for Larson to stay until 2:00 p.m., two hours past the usual check out time. Larson did not leave by 2:00 p.m. and

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[2] His affidavit also states he spent $250,000 in his defense: $30,000 to Jay Kelly, $50,000 to Goodman, and the remainder to Raymond Smith.

subsequently told a maid that he intended to stay an additional night. He did not pay for the second night, however. At about 5:30 p.m., fearing that Larson would leave without paying for certain telephone calls, a hotel manager sent a bellman to check out the room. Informed that no one was present, the manager entered the room, where he found personal effects, empty liquor bottles,

prescription pills, and grocery bags containing plastic bags of white powder. He informed the general manager, who called the police. After police arrived at the motel and knocked on the room door, Larson responded and refused to permit them to enter the room. The motel manager consented to the search, but no warrant was obtained.

In his objections, Larson concentrates his fourth amendment argument on the warrantless search of the grocery bags found in the motel room, which he describes as

closed containers.[3] Magistrate Boline, relying on Stone v. Powell, 428 U.S. 465 (1976), concluded that Larson was not entitled to raise fourth amendment claims because he had already had a "full and fair opportunity" to present them at a number of stages in the proceedings: in his pretrial suppression motion before Magistrate J. Earl Cudd and on de novo review to the district court, at trial, in a motion for a new trial, on appeal, and in his petition to the Supreme Court for a writ of certiorari. To the extent that Larson and counsel failed specifically to raise the container issue, the Magistrate found that it had been waived under Fed. R. Civ. P. 12(b)(3) and (f).

Larson argues that the magistrate overestimates the scope of Stone v. Powell

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[3] The trial testimony revealed that when the hotel manager looked into the grocery bags, he saw plastic bags inside, filled with white powder. Not all the plastic bags were in manila envelopes, and the tops of some of the grocery bags were open. Pretrial Transcript (P.T.) (Vol.) I: 62-3, 134. Trial Transcript (T.T.) II: 307-8,312,336,351,373.

and that he did not waive his container search

argument. He states "[p]ermission to raise the container issue mid-trial would most likely have been denied, (Objections at 16) and at trial "it was already too late to raise the container issue." (Objections at 21). The record contradicts this. The court told petitioner at trial he had the right to challenge the government's evidence and warned he was in danger of giving up that very important right. T.T. I: 220-21; II: 394. He was told the jury would decide this fate based "on the evidence that I allow in and on the instructions that I'm going to give at the end of the case." T.T. I: 221. Larson admitted he understood this.[4] And Smith continued to raise

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[4] The Court: "You have the right to object to any evidence that comes in by any form. You have the right to request limiting instructions from the court. You have the right to seek to suppress evidence during the course of the trial . . . . You understand that . . . don't you?"

suppression issues at trial T.T. II: 299, III: 528.

The objections suggest that the focus of Larson's argument is not so much the fourth amendment per se. Rather, he stresses that counsel's failure to raise the container argument is proof of ineffective assistance. The ineffective assistance argument will be considered separately.

The court finds itself in basic agreement with Magistrate Boline's findings and conclusions with respect to the full and fair opportunity petitioner had to litigate fourth amendment

claims and his waiver of the right to raise them. Larson is not entitled to mount a collateral attack here on the search and seizure of the bags. Nor is he entitled to a new trial or the suppression of the evidence. Even if the court were to reach

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Larson: "Yes, I do, Your Honor."

T.T. III: 442

the merits of the container issue, the record indicates at least some of the cocaine was in plain view rather than in closed and opaque container. See supra note 3.

Ineffective Assistance of Counsel

Several attorneys appeared on Larson's behalf during the pre-trial stages of the case including Jay Kelley of Minneapolis, Minnesota, Raymond Smith of Chicago, Illinois, and Oscar Goodman of Las Vegas, Nevada.

On January 30, 1984, two days before trial, Larson moved for a continuance. Larson explained that he had hired three sets of attorneys - one to conduct the trial, one to handle pre-trial motions, and one to serve as local counsel. Although he had not previously informed the court of this arrangement, he argued that only Goodman could present the case at trial and that he was engaged in another trial which would last approximately one week. The

motion for a continuance was denied because Larson had had adequate time for trail preparation and adequate notice of the trial date. Larson reentered his motion on February 1, 1984, the trial date. The motion was again denied. The court cited the previous grounds for denial and noted the case was not particularly complex, it was increasingly clear when Goodman would

even be available for trial, and Smith was familiar with the facts of the case.

The court also denied a motion to withdraw appearances by Larson's other counsel and required Smith to act as standby counsel. The court advised Larson of the perils of proceeding without counsel, not participating in the trial, and not permitting his attorneys to do so.[5]

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[5] Some examples are illustrative.

> The Court: "I hope you'll listen to me carefully right now, because I think that the posture that you're proceeding under right now is not in your best

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interest, and let me explain why . . . . So the consequences for you of the trial could be very great."

T.T. I: 59-60.

The Court: "You'd be much better off if you had your lawyer representing you here. . . . I advise you that in my judgment it would be a foolish step for you to take."

T.T. I: 63.

The Court: "Think about it very carefully"
Larson: "I'll do that"
The Court: "Under any way you look at it, you'd be better off . . . ."

T.T. I: 64.

The court told Larson he was foolish not be represented by the able counsel available at trial and that constitutional rights can be waived or given up. T.T. I: 116; 218-19.

The Court: "I want you again to talk with the lawyers who have appeared in this case, your standby counsel here, and with Mr. Goodman. It's going to be up to you, but if you choose to go

Nevertheless, Larson refused to

permit counsel to participate in the trial and chose essentially to stand mute.

> forward in this way, you are giving up very important constitutional rights."
>
> Larson: "In understand that. I appreciate your concern. Mr. Smith is concerned as well, and I've got a certain amount of concern myself. I've got this afternoon to talk with him and think about it and make that decision. As of yet, I haven't made a decision."

T.T. II: 222

> The Court: "I must inform you that you are giving up significant constitutional rights of representing yourself or, more importantly, in my judgement, of being represented by capable counsel that's familiar with this case"

T.T. II:230

Larson was told he could change his mind at any time. He stated that he "appreciate[d] [the court's] genuine concern" and would let the court know. T.T. II: 231.

Larson now argues that he is entitled to a new trial because two lawyers denied him adequate assistant of counsel. Larson's argument as to attorney Goodman rests on his advice that a continuance would be granted or a new trial would be ordered on appeal. Larson asserts that he believed the "prominent" Goodman and therefore relied on his incorrect advise. Larson's argument as to attorney Smith largely rests on his failure to raise the container search issue in the trial court.

Magistrate Boline refrained from making a finding relating to Goodman's alleged advice or whether it was outside the "range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 690 (1984). It is unnecessary to reach the issue of professional competence if petitioner has not demonstrated prejudice, however. Strickland, 466 U.S. at 695-96;

United States v. Reed, 756 F.2d 654, 656

(8th Cir.), cert. denied, 106 S. Ct. 111 (1985). For purposes of this motion, the court assumes Goodman gave the advice petitioner claims, but finds that the record shows that petitioner was not prejudiced by such advice.

It was clear at trial that petitioner was making his own decisions after considering the court's instructions and conferring by phone with Goodman and in person with Smith, his standby trial counsel. See, e.g., T.T. I: 63, 222; II: 229, 231. This court gave repeated and detailed instructions to him personally at various steps of the trial. T.T. I: 58-64, 116, 216-22; II: 230-31; III: 442,548. The court advised him he had no constitutional right to a particular attorney and that he would lose specific rights and opportunities by persisting in his policy of not participating in the trial. Petitioner weighed the various advice he received and made his voluntary decision to proceed in

the way he did. He chose not to heed the court's specific warnings. Clearly he is dissatisfied with the outcome, but he has not shown that it was caused by ineffective assistance of counsel.

As the magistrate said, the evidence against petitioner was overwhelming. He was "caught 'red-handed' with about three pounds of pure cocaine." Report and Recommendation at 19. Other indicia of the drug trade were also found in his room, such as scales, a cutting agent, and packaging equipment. Petitioner stated at trial that Smith was his suppression expert, so

Goodman's absence was not considered critical by him for search and seizure issues. It was petitioner who ordered Smith not to represent him at trial even though Smith was there and in fact continued to act to suppress evidence. T.T. II: 299,528. The court also told petitioner that he could object to the introduction of any evidence.

T.T. I: 220-21; II: 394; III: 442. In short, any advice from Goodman, even if ineffective, or his failure to appear at trial, was not prejudicial under all the circumstances.

Petitioner also claims that Smith's failure to raise the issue of the warrantless search of the containers in the motel room amounted to ineffective assistance of counsel In his affidavit, he states that he informed the defense team that the cocaine seized "was enclosed in paper bags and also in manila envelopes or smaller paper bags inside the larger bag" and that the defense team had access to photographs of the evidence in the motel room.

The testimony at trial was that not all the cocaine was contained in opaque packaging and that at least some of the cocaine was visible to the hotel manager when he looked around the room. See supra note 3. As already referenced, petitioner

chose not to participate with his attorney at trial in the attempt to suppress the evidence. Smith showed himself to be an able attorney in this case, and defense counsel in fact succeeded in suppressing additional amounts of cocaine and in getting a

second count dismissed. His performance certainly was within the range of reasonable professional conduct. Petitioner has mischaracterized what happened at trial in his attempt to show ineffective assistance, but the record refutes his claim.

Motion for Resentencing

Petitioner advances several bases for his request for resentencing: (1) asserted failure to comply with Fed. R. Civ. P. 32 (c)(3)(D) and possible reliance on two prior convictions that should have been expunged from his record; (2) the asserted applicability of 48 U.S.C. § 4205 (b)(2); and (3) the reversal of his co-defendant's

conviction. In his Objections, Larson indicates no objection to the magistrate's findings that the second and third of these arguments must fail.

> Under Rule 32 (c)(3)(D), where the defendant or counsel allege[s] any factual inaccuracy in the presentence investigation report ... the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

Petitioner now concedes that the court did order expungement of a prior conviction for possession of methamphetamines, but he argues that the reference to a conviction for driving under the influence and open bottle should also have been expunged due to an uncounseled guilty plea. He also alleges error in failing to make specific findings about allegedly incorrect financial information and in failing to exclude portions of the presentence report (PSI) allegedly based on grand jury materials.

Prior to sentencing on May 2, 1984,[6] petitioner submitted two sets of written objections to the PSI. One was written by attorney Kelley and also signed by petitioner; the other was written by Larson himself. These documents complained about certain financial information being grand jury material and about other references to two prior convictions, automobile and house searches, informant statements, and details relating to the motel where the evidence was found. As the magistrate noted, petitioner essentially "objected to the nature of the information" rather than to any potential factual inaccuracies. Report and Recommendation at 25-26.

At the sentencing hearing, petitioner and attorney Smith said they had no further objections. Sentencing Transcript (S.T.) 3-4. Defense counsel recognized that the

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[6] Petitioner was permitted to remain free on bond pending determination of his appeal so he did not begin to serve his sentence until October 2, 1985.

court had ruled on the objections. S.T. 3. The court noted all the objections and ordered that the PSI be altered to reflect that the conviction for possession of methamphetamines had been expunged. S.T. 31. Other objections were overruled because the type of information challenged had been "generally accepted as appropriate for a presentence report." Id. The court stated to petitioner that

"the evidence associated with this trial shows that you have been a major drug dealer." S.T. 31 (emphasis added).[7]

As indicated at sentencing, the sentence was based on the evidence introduced at trial. The court did not take into consideration in sentencing the

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[7] Petitioner apparently believes that the court's characterization of him as a "major drug dealer" was based on financial data in the PSI. In fact, it was based on the substantial quantity of nearly pure cocaine seized from the motel room, as well as the other indicia of drug distribution found there.

challenged financial data, any prior conviction, statements from informants, or results of automobile or house searches. In regard to the events at the motel, the court relied on the trial evidence.

Under Fed. R. Crim. P. 32(c)(3)(D), the court should have made clearer findings and determinations at the sentencing hearing and appended them to the PSI, together with copies of petitioner's objections. Written determinations, together with the objections, will be attached to the PSI and forwarded to the appropriate places. To this extent, petitioner is entitled to relief. He is not entitled to be resentenced, however. United States v. Weber, 818 F.2d 14 (8th Cir. 1987). The record as a whole makes clear that no dispute matter affecting the sentence "remained unaired or unresolved at the hearing." Id. at 15.

Petitioner continues to object to financial data found in the PSI on the

grounds that it represents unwarranted use of grand jury materials. He relies on United States v. Hogan, 489 F. Supp. 1035 (W.D. Wash. 1980), which held that probation

officers were not entitled to automatic disclosure of grand jury testimony under Fed. R. Crim. P. 6(e)(3)(A)(ii). The instant case is not like Hogan. The Hogan PSI contained material clearly obtained from grand jury records. Here the source of the material was the United States Attorney's office and the Internal Revenue Service. "There is no question that the probation officer ... is entitled to interview government agents and prepare a report that includes the substance of the interviews and the probation officer's personal conclusions." 489 F.Supp. at 1039. It appears that the probation officer in this case did just that. As indicated at the time of sentencing, this objection should be overruled.

Conclusion

After carefully reviewing the record and petitioner's requests for relief, the court concludes that he is not entitled to the relief he seeks and that his motions should be denied and his petition dismissed. Copies of his objections at sentencing and the court's findings and determinations should be attached to his PSI, however, and this will be addressed in a separate order to be issued today.

Accordingly, based upon the above and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that petitioner's motions for relief under 28 U.S.C. § 2255 are denied, and his petition is dismissed.

Dated: July 2, 1987

DIANA E. MURPHY
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil 4-86-483
Criminal 4-83-84(1)

DUANE W. LARSON,

Petitioner,

vs.

REPORT AND RECOMMENDATION

UNITED STATES OF AMERICA,

Respondent.

Duane W. Larson, #10786-041, FCI, P.O. Box 1000A, Sandstone, Minnesota 55072, pro se.

Richard E. Vosepka, Assistant United States Attorney, 234 United States Courthouse, 110 South Fourth Street, Minneapolis, Minnesota 55041, for respondent.

Before the Court are various motions brought by petitioner, Duane W. Larson, under 28 U.S.C. Section 2255. This matter has been referred to the undersigned United States Magistrate for Report and Recommendation in accordance with 28 U.S.C. Section 636 and Local Rule 16.

REPORT

Duane W. Larson (hereinafter Larson) was tried in United States District Court for the District of Minnesota on a one-count indictment charging him with possession with intent to distribute cocaine, 21 U.S.C. Section 841 (a)(1), and aiding and abetting, 18 U.S.C. Section 2. After a jury trial before District Judge Diana E. Murphy, Larson was convicted and sentenced to imprisonment for ten years.

- 1 -

The judgment of conviction was affirmed on appeal to the Eighth Circuit. United States v. Larson, 760 F.2d 852 (8th Cir.), cert. denied, 106 S.Ct. 143 (1985).

On August 1, 1985, Larson was convicted in the District of Minnesota on two counts of concealment of multiple currency transactions, 18 U.S.C. Section 1001. These two convictions were reversed on appeal. United States v. Larson, 796 F.2d 244 (8th Cir. 1986). Larson also pleaded guilty to

one count of tax evasion, 26 U.S.C. Section 7201. He received a sentence of five years, to be served consecutively to the ten-year sentence imposed by Judge Murphy. Larson in now serving an aggregated sentence of fifteen years at the Federal Correctional Institutional in Sandstone, Minnesota.

Larson's Section 2255 motion is 75 pages long, and includes six separate motions for various types of relief. First, Larson claims that evidence admitted against him at trial was obtained in violation of the fourth amendment. Second, Larson contends he was denied effective assistance of counsel in his representation by Attorneys Oscar Goodman and Raymond Smith. Third, Larson argues he is entitled to a new trial with "counsel of his choice." Fourth, Larson contends he should be resentenced because Judge Murphy failed to make findings as required by F. R. Crim. P. 32 (c)(3)(D); he is entitled to a sentence under 18 U.S.C. Section 4205(b)(2); he was improperly

sentenced for aiding and abetting; and Judge Murphy should not have considered his two prior convictions. Fifth, Larson

requests reconsideration of his previous motion for modification of his sentence under Rule 35. Sixth, Larson argues that his aiding and abetting conviction should be vacated because his codefendant's convictions were reversed on appeal.

As a preliminary matter, the undersigned must determine whether Larson is entitled to an evidentiary hearing. Section 2255 requires such a hearing "[u]nless the motion and the files and records of the case show conclusively that the prisoner is entitled to no relief ...." 28 U.S.C. Section 2255. The decision as to whether an evidentiary hearing is necessary to determine factual contentions is committed to the discretion of the district court. See Widgery v. United States, 796 F.2d 223, 224 (8th Cir. 1986).

The facts in this case have been developed through a pretrial evidentiary hearing, a jury trial, and an appeal. The undersigned has reviewed Larson's motions and the extensive record generated by these proceedings, including a lengthy trial transcript. Larson himself relies almost exclusively on the existing record. The undersigned finds that, with the possible exception of certain alleged conversations between Larson and Attorney Oscar Goodman, the files and records do provide an adequate basis for determination of this Section 2255 motion. The undersigned therefore concludes that no evidentiary hearing is required, and none will be held, at this time.

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Rather than belabor the facts of this case, which are both familiar to the Court and contained in the published opinion in Larson, supra, the under signed will proceed to address the issues presented. Particular facts relevant to the legal issues will be

included as appropriate.

I.

MOTION TO SUPPRESS

Larson first contends that evidence seized from his motel room and admitted against him at trial was obtained in violation of the fourth amendment. Larson's pretrial motion to suppress this same evidence on fourth amendment grounds was denied, and the denial of that motion upheld on appeal. See Larson, supra, at 854-56. Larson now presents a "container search" argument for suppression of the evidence, and contends that claim is cognizable in this Section 2255 proceeding. Larson wants this Court to vacate his convictions, suppress the evidence, and grant him a new trial.

Collateral Review of Fourth Amendment Claims

In Kaufman v. United States, 394 U.S. 217, 231 (1968), the Supreme Court held that a federal prisoner may mount a collateral attack under Section 2255 where evidence

obtained in an illegal search and seizure was admitted against him at trial. See also Johnson v. Petrovsky, 626 F.2d 72,73 (8th Cir. 1980) (holding only that voluntary guilty plea barred fourth amendment claim). The Kaufman majority rejected the rule, consistently

followed by a majority of the Courts of Appeals, that such claims could only be presented on appeal. Kaufman, supra, at 2129-21 n.3-4; see Stone v. Powell, 428 U.S. 465, 479 n. 12 (1975). The majority opinion in Kaufman reviewed the historical scope of habeas corpus and Section 2255, and observed that "the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial." Kaufman, supra, at 225. The majority found no substantial differences between state and federal prisoners, and rejected the government's argument that collateral

remedies for federal prisoners should be more limited. Id. at 225-28. However, the majority also recognized that "where the trial or appellate court has had a 'say' on a federal prisoner's claim, it may be open to the Section 2255 court to determine that on the basis of the motion, files, and records, 'the prisoner is entitled to no relief.'" Id. at 227 n. 8 (citing Thornton v. United States, 368 F.2d 822, 833 (D.C. Cir. 1966) (dissenting opinion of Wright, J.)).

The Kaufman decision stood unassailed for eight years, until the landmark case of Stone v. Powell, 428 U.S. 465 (1976), in which the Supreme Court held that:

> where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

428 U.S. at 482. The Stone v. Powell

majority focused on the

primary justification for the exclusionary rule: 'the deterrence of police conduct that violates Fourth Amendment rights." Id. at 486. The court characterized Kaufman as "premised on the view that implementation of the Fourth Amendment also requires the consideration of search-and-seizure claims upon collateral review of state convictions" and found this view "unjustified." Id. at 481, 486; see Roach v. Parratt, 541 F.2d 772, 773 (8th Cir. 1976).

After balancing the utility of the exclusionary rule against the costs of extending it to collateral review of fourth amendment claims, the Stone majority concluded that "the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the a substantial costs of application of the rule persist with special force." Id. at 495. The court noted that

"in the case of a typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is normally asking society to redetermine an issue that has no bearing on the basic justice of his incarceration." Id. at 492 n. 31. Finally, the court also noted the effect of its holding on the earlier decision in Kaufman:

> The issue in Kaufman was the scope of Section 2255. Our decision today rejects the dictum in Kaufman concerning the applicability of the exclusionary rule in federal habeas corpus review of state-court decisions pursuant to Section 2254. To the extent the application of the exclusionary rule in Kaufman did not rely upon the supervisory role of this Court over the lower federal courts, cf. Elkins V. United States, 364 U.S. 206 (1960), see infra at 484,
>
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>
> the rationale for its application in that context is also rejected.

Id. at 481-82 n. 16.

Since Stone v. Powell the Supreme Court has not specifically addressed the scope of collateral review of fourth amendment claims by federal prisoners under Section 2255.

However, the Ninth Circuit has interpreted Stone v. Powell as precluding such claims:

> Thus, according to Stone v. Powell, a federal court may not grant either Section 2254 or Section 2255 habeas corpus relief on the basis that evidence obtained in an unconstitutional search or seizure was introduced, respectively, at a state or federal trial where the defendant was provided an opportunity to litigate fully and fairly his fourth amendment claim before petitioning the general court for collateral relief.

Tisnado v. United States, 547 F.2d 452, 456 (9th Cir. 1976); see also United States v. Hearst, 638 F.2d 1190, 1196 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981). In Hearst the Ninth Circuit made the further observation that:

> If the provided opportunity has been squandered due to defense counsel's incompetence or misconduct, a convict's only option on collateral review is a sixth amendment claim based on inadequate assistance of counsel.

Hearst, supra, at 1196 (citing Canary v. Bland, 583 F.2d 887, 890 (6th Cir. 1978)).

These cases have led one noted commentator to observe that, after Stone v.

Powell, the holding in Kaufman "appears to have lost its vitality." 4 W. LaFave, Search and Seizure Section 11.7(f) (2d ed. 1987). Another scholar has more

forcefully stated that the "full and fair opportunity" rule:

> surely must apply to a federal prisoner seeking relief under Section 2255, and it will only be in a highly unusual case in which there was not a full and fair opportunity to litigate the Fourth Amendment claim in the original trial and appeal that it will be raisable on motion.

C. Wright, Federal Practice Section 594, p. 453 (2d ed. 1982); see also United States v. Byers, 740 F.2d 1104, 1137 n. 90 (D.C. Cir. 1984) (concurring opinion of Robinson, C.J.).

Foregoing analysis shows a recent trend in the law away from the broad-based collateral review of fourth amendment claims espoused in Kaufman and toward the more limited scope of review set forth in Stone v. Powell. While the Supreme Court and the

Eighth Circuit have not as yet applied the "full and fair opportunity" rule to a fourth amendment claim by a federal prisoner under Section 2255, the undersigned believes that rule best accommodates the deterrent purposes behind the exclusionary rule and the goal of finality, which must be reached at some point in criminal proceedings. See Stone v. Powell, supra, at 480-89.

Moreover, to freely extend collateral review of fourth amendment claims to federal prisoners under Section 2255 and Kaufman, while precluding similar claims by state prisoners under Section 2254 and Stone v. Powell, would be to sanction unequal treatment. See generally Kaufman, supra, at 228-31; see also Stone v. Powell, supra, at 519 n. 14 (dissenting opinion of Brennan, J.).

The undersigned is persuaded by the reasoning in Tisnado, supra, and concludes that Larson may not raise a fourth amendment

claim under Section 2255 unless he was previously denied a "full and fair opportunity" to litigate that claim.

Full and Fair Opportunity

The Eighth Circuit has discussed the "full and fair opportunity" doctrine at length in the context of petitions for federal habeas corpus relief by state prisoners:

> It is the existence of state processes allowing an opportunity for full and fair litigation of fourth amendment claims, rather than a defendant's use of those processes, that bar federal habeas corpus consideration of claims under Stone. '[I]f state procedures afford the defendant in a criminal case the opportunity to [fully and fairly] litigate whether evidence obtained in violation of the fourth amendment should be excluded ... then Stone v. Powell precludes federal habeas corpus consideration of those issues whether or not the defendant avails himself of that opportunity.' The Stone bar applies despite a state court's error in deciding the merits of a defendant's fourth amendment claim. Moreover, the Stone bar applies with equal force to procedural mistakes that thwart the presentation of fourth amendment claims.

Lenza v. Wyrick, 665 F.2d 804, 808 (8th Cir. 1981) (citations omitted); see also Brunson v. Higgins, 708 F.2d 1353, 1360-61 (8th Cir. 1983). Federal courts have summarily denied habeas corpus relief to state prisoners who received a "full and fair opportunity" to present their fourth amendment claims even where it was clear that illegally obtained evidence was admitted against them at trial. See Wolff v. Rice, 428 U.S.

465, 471-74 (1976) (decided with Stone v. Powell, supra); Lenza, supra, at 809 n. 6; Holmberg v. Parratt, 548 F.2d 745, 746 n. 1 (8th Cir. 1977).

In this case, Larson made a pretrial motion to suppress all items seized from his motel room by the Burnsville police. After an evidentiary hearing, United States Magistrate J. Earl Cudd recommended that the motion be denied because Larson had no reasonable expectation of privacy in the room and police had probably cause to

believe illegal narcotics were present "and that exigency required immediate action ...." D.C. Document No. 22 at 6. Larson objected to the Magistrate's recommendation, challenged "almost every factual finding: and argued that police had no probably cause to believe the powder found in the room by motel staff was contraband. D.C. Document No. 31 at 1 and 11.

Judge Murphy made a de novo review of the record and agreed with the Magistrate's determination that Larson's motion should be denied. At trial, Larson continued to object to the admission of any of the items seized from the motel room. Transcript at 528. Larson also argued in his motion for a new trial that the evidence was erroneously admitted. D.C. Document No. 58.

Larson then appealed his conviction to the Eighth Circuit, and again argued that the evidence seized in the warrantless search of the motel room should have been suppressed. See Larson, supra, 760 F.2d at

854-56. The Court

of Appeals also found Larson had no legitimate expectation of privacy in the motel room, agreed with the Magistrate that there were exigent circumstances justifying a warrantless search, and affirmed the district court's denial of Larson's suppression motion. Id. The court cited with approval the reasoning in United States v. Parizo, 514 F.2d 52, 54 (2d Cir. 1975), that "[w]hen the rental period has elapsed, the guest has completely lost his right to use the room and any privacy associated with it." Larson, supra, at 885 (emphasis omitted). The court also noted that once the rental period has lapsed, "the manager of a motel then has the right to enter the room and may consent to search of the room and the seizure of the items there found." Id. (citing United States v. Croft, 429 F.2d 884 (10th Cir. 1970)) (emphasis added). On October 7, 1985, the Supreme Court denied

Larson's petition for writ of certiorari. United States v. Larson, 106 S.Ct. 143 (1985).

Thus, Larson had the opportunity to present his fourth amendment claims in a pretrial suppression hearing; by objection at trial; in a motion for new trial; on appeal; and, finally, in his petition to the Supreme Court. The undersigned finds that Larson has already had a "full and fair opportunity" to present his claim that evidence used against him at trial was obtained in violation of the fourth amendment. See Lenza, supra, at 808. The undersigned therefore concludes that under the circumstances of this case,

Larson is barred from litigating fourth amendment claims in this collateral proceeding under Section 2255. See Stone v. Powell, supra; Hearst, supra; Tisnado, supra.

Waiver and Deliberate Bypass

Larson takes the position in his Section 2255 motion that evidence seized from the motel room should have been suppressed as the fruit of an illegal container search. Larson argues that while he had no legitimate expectation of privacy in the motel room, see Larson, supra, at 855, he retained such an interest in the paper bags containing the cocaine. He thus seeks to distinguish his present fourth amendment claim from the issue already decided adversely to him. See generally Motion at 1-46, Traverse at 2-12.

The undersigned finds that while the focus of Larson's present claim differs somewhat, he is actually advancing the same ground for relief: suppression under the exclusionary rule. See Sanders v. United States, 373 U.S. 1, 16 (1962). Moreover, Larson failed to raise the container search claim by pretrial motion, at trial, or on appeal. Larson's contention that fault lies with his counsel, Raymond Smith, is a sixth

amendment issue and will be discussed below. For purposes of this analysis, Larson's failure to make a pretrial suppression motion claiming that containers were illegally searched resulted in a waiver of that defense. F. R. Crim. P. 12(b)(3) and (f); United States v. Ostertage, 619 F.2d 767, 771 n. 3

(8th Cir. 1980) (citing United States v. Johnson, 614 F.2d 622 (8th Cir. 1980)).

Larson states in his motion that "it became abundantly apparent that the cocaine was sealed in packages and concealed from view" during the trial. See Motion at 8-12, 50. Larson's own decision to forego a defense and his instructions to Attorney Smith that he was not to participate in the trial precluded the possibility of raising the container search issue during trial, as allowed under Rules 12(f) and 41(f). Again, Larson's contention that his decision was based on erroneous advice from Attorney

Oscar Goodman is a sixth amendment claim, and will be discussed below. Larson's defensive posture (or lack thereof) prevented litigation of the container search issue at the proper time and in the proper forum: the district court. Larson adopted that posture with the knowledge of the risks it entailed, and disregarded warnings from the trial court.

The undersigned therefore concludes that Larson is not entitled to Section 2255 relief because he "deliberately bypassed the orderly federal procedures at or before trial and by way of appeal...." Kaufman, supra, at 227 n. 8; see e.g. Individglio v. United States, 612 F.2d 624 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980) (failure to raise fourth amendment claim at trial constituted waiver and precluded Section 2255 relief). Larson's motion to suppress evidence and for a new trial should be denied.

II.

INEFFECTIVE ASSISTANCE OF COUNSEL

Larson advances two separate claims that he was denied effective assistance of counsel, as guaranteed by the sixth amendment. First, Larson contends he received incompetent advice from Attorney Oscar Goodman. Larson alleges that Goodman told him he would have grounds for a new trial if the court did not grant a continuance until Goodman could appear. Motion at 47. Specifically, Larson alleges Goodman told him: "don't defend yourself or let anybody else defend you" if the continuance was denied. Motion at 48. Larson argues that his decision not to participate in his trial was based entirely on this alleged advice from Goodman.

Secondly, Larson argues he was denied effective assistance of counsel by the conduct of Attorney Raymond Smith, who handled the pretrial motions and acted as "standby" counsel at trial. Larson alleges

that Smith was incompetent because he failed to raise the container search issue addressed above. Larson further alleges that Smith did not adequately prepare his case because he failed to interview all the employees from the motel where the evidence was seized, and did not investigate the scene. Motion 52-53. Finally, Larson alleged that Smith failed to raise several other legal issues, any one of which would have resulted in the suppression of evidence. Motion at 54-56.

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The Strickland Standard

In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show both that (1) his counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466

U.S. 668, 688, 694 (1984); see also Kimmelman v. Morrison, 106 S.Ct. 2574, 2586-87 (1986).

In evaluating the reasonableness of an attorney's conduct under the first prong of Strickland, the court must:

> judge the reasonableness of counsel's challenged conduct on the facts of the particular case viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Strickland, supra, at 690. There is a strong presumption that counsel has "rendered adequate assistant and made all significant decisions in the exercise of reasonable professional judgement." Id.

Even if the court determines that counsel made unprofessional errors, the defendant must also meet the second prong of

the Strickland test, and show "there is a reasonable probability that, absent the errors, the fact finder would have

had a reasonable doubt respecting guilt." Id. at 695. The court must consider the totality of the evidence before the jury, and determine " if the decision reached would likely have been different absent the errors." Id. at 695-96. Keeping this standard in mind, the undersigned now turns to the specific claims advanced by Larson.

Alleged Advice From Attorney Goodman

Larson has made serious allegations, detailed above, concerning advice given him by Attorney Oscar Goodman. Larson made his allegations under penalty of perjury. See Rule 2(b), Rules Governing Proceedings Under Section 2255.

The government argues it is implausible that goodman gave Larson such advice, and that if he did, he should be disbarred for "unconscionably unethical practice."

Response at 5. The government also points out that Larson represented to the trial court that he would not participate in his trial in the absence of Goodman because of his feeling that no other attorney was prepared to try the case. Transcript at 229-31. The trial court had previously informed Larson he had no right to a specific attorney, and that he had already preserved the continuance issue for appeal. Id. at 59-63. However, the government has not presented any evidence to directly refute Larson's allegations.

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The First Prong: Professionally Unreasonable Error

On the present state of the record, the undersigned is reluctant to make a factual find as to the precise nature of the advice given Larson by Attorney Goodman. To do so without any information from Goodman himself would be unfair and unwise. Such a finding is, of course, essential to application of the first prong of the Strickland test.

However, the undersigned does not perceive an immediate need for the evidentiary hearing requested by Larson. Traverse at 13. Instead, the undersigned believes this case to be a proper candidate for expansion of the record under Rule 7 of the Rules Governing Proceedings Under Section 2255. The undersigned would have the authority under Rule 10 to order such an expansion of the record.

But this procedure need not be followed if the Court concludes from her personal knowledge or recollection that Larson's allegation is unsubstantiated, Marchibroda v. United States, 368 U.S. 487, 495 (1962), or finds that he has not demonstrated prejudice under the second prong of the Strickland test. See United States v. Reed, 756 F.2d 654, 656 (8th Cir.), cert. denied, 106 S.Ct. 111 (1985).

If the Court cannot reach either conclusion, this matter may be referred to the undersigned for drafting of appropriate

interrogatories directed to Attorney Goodman, or for issuance of an Order directing Goodman to submit an affidavit addressing Larson's allegations. See Rule 7, supra.

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The Second Prong: Prejudice

Larson argues he was denied a trial altogether because he followed Goodman's advice and presented no defense in hopes of winning a new trial on appeal, based on the denial of a continuance. The undersigned is assuming, for purposes of this analysis, that Larson was so advised by Attorney Goodman, and that such advice was professionally unreasonable. Several circumstances surrounding Larson's trial bear on a determination of whether he has shown prejudice as defined in Strickland, supra, at 695.

First, Larson's statement to the trial court regarding his decision not to participate in his trial does not include

any reference to the continuance issue:

> Your Honor, I've decided to stand on my decision. I've considered it and discussed it with Mr. Smith. It's not that I want Mr. Goodman so much; it's just that he's the only attorney that's prepared, and he's well aware of the narcotics laws. I don't believe Mr. Smith is; I'm certainly not. And I believe I'll stay with what I've decided.

Transcript at 229; see Statement of Smith, D.C. Document 41. Larson's statement supports an inference that he would have taken his "no defense" posture regardless of Attorney Goodman's advice. Larson argues that this inference is "unrealistic." Motion at 48-49. If the inference is valid, it seems questionable whether Larson has met the "but for" test in the prejudice prong of the Strickland standard.

Second, Larson's codefendant, Sheila Burgess, was

represented by counsel throughout the trial. It is true that Burgess' counsel, Michael Nash, made it clear that he was only acting

on behalf of his client and not Larson. Transcript at 64-67. However, Burgess was charged with the same offense as Larson based on a single factual episode. Attorney Nash cross-examined virtually all of the government's witnesses with the goal of exposing any weaknesses in their testimony. Even so, the jury found both Burgess and Larson guilty. Burgess' conviction was later reversed on appeal because the Eighth Circuit found insufficient evidence to tie her to the cocaine seized from the motel room. See Larson, supra, at 857-58. Larson did not challenge the sufficiency of the evidence on appeal. Id. at 853.

Finally, the evidence against Larson can only be characterized as overwhelming. The testimony of the government's witnesses established that Larson was caught "red-handed" with about three pounds of pure cocaine. It is doubtful that even the trial skills formerly attributed to Attorney Goodman by Larson could have secured a

favorable verdict under such circumstances.

The under signed declines to make a finding as to whether Larson has shown prejudice, as required by Strickland, supra. Such a finding would more appropriately be made by the Court, who acted as the trial court in this case and had the opportunity to observe the witnesses and hear their testimony. The undersigned believes the court is therefore uniquely

qualified to determine whether Larson has demonstrated a reasonable probability that the outcome of his trial would have been different.

Conduct of Attorney Smith

Larson first contends Attorney Smith should have raise the container search issue, discussed above, either in his pretrial motion to suppress or during trial under Rules 12(f) and 41(f) of the Federal Rules of Criminal Procedure. Larson's contention that Smith did not adequately

investigate his case is also tied to the container search issue: Larson argues that had Smith questioned the motel employees or investigated the scene, he would have discovered facts which would ultimately have led to the suppression of evidence.

These claims are similar to those raised in the recent case of Kimmelmann v. Morrison, supra. In Kimmelmann, the Supreme Court applied the Strickland standard in the context of a collateral attack by a state prisoner under 28 U.S.C. Section 2254. Like Larson, the prisoner in Kimmelmann alleged he was denied effective assistance of counsel because his attorney failed to raise a fourth amendment claim. In discussing the appropriate standard to be applied in such a case, the Supreme Court Stated:

> As is obvious, Strickland's standard, although by no means insurmountable, is highly demanding. More importantly, it differs significantly from the elements of proof applicable to a straight-forward Fourth Amendment claim. Although a meritorious Fourth Amendment issue is

> necessary to the success of a Sixth Amendment claim like respondent's, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under Strickland that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence.

Id. at 2587 (emphasis added).

That Attorney Smith did not raise the container search issue now pressed by Larson cannot alone be regarded as a professionally unreasonable error. See Strickland, supra, at 688; Individglio, supra, at 628-29; see also United States v. Meyer, 417 F.2d 1020, 1023-24 (8th Cir. 1969). It is clear from the circumstances of the search, and from Larson's own statement of facts in his 2255 motion, that he was more ultimately familiar with the location and packaging of the cocaine and the other evidence than the other witnesses. See generally Motion. If Attorney Smith was unaware until midway

through the trial that the cocaine was concealed inside sealed envelopes, his ignorance can only be attributed to Larson's failure to inform him of that fact. See Strickland, supra, at 691; compare Kimmelman, supra (attorney's own negligence in failing to conduct any discovery whatsoever made him unaware of damaging evidence). Larson has not alleged that he ever informed Attorney Smith of these facts, which would be crucial to the viability of a suppression motion based on an illegal container search. The undersigned notes that Attorney Smith and his associates devoted some 400 hours to pretrial motions

on behalf of Larson. See D.C. Document 41. The undersigned concludes that Larson was not denied effective assistance of counsel in his pretrial representation by Attorney Smith.

Larson's claim that Smith should have requested a suppression hearing on the

container search issue based on facts adduced at trial is disingenuous. Larson instructed Smith, who was instructed by the Court to act as "stand-by" counsel, not to take any part in the proceedings. Larson cannot now complain that he was denied effective assistance of counsel because Smith followed his instructions. See Faretta v. California, 422 U.S. 806 (1975); United States v. Dickens, 695 F.2d 765 (3rd Cir. 1982), cert. denied, 460 U.S. 1092 (1983).

Larson also contends there were other legal grounds available to Attorney Smith, any of which "would have resulted in a suppression of evidence." Motion at 56. Had Smith failed to move for suppression of evidence altogether, this argument might carry some weight. See e.g. Morrison v. Kimmelman, 752 F.2d 918 (3rd Cir. 1985), aff'd, 106 S.Ct. 2574 (1986). However, Smith did argue for suppression on the grounds that Larson had a reasonable

expectation of privacy in the motel room. See Larson, supra, at 854-56. Contrary to Larson's assertions, the undersigned finds there was substantial merit in this position, which was addressed at length by the Eighth Circuit. Id. Further, effective assistance of counsel "does not demand that every possible

motion to be filed, but only those having a solid foundation." United States v. Hines, 470 F.2d 255, 2332 (3rd Cir. 1972), cert. denied, 410 U.S. 968 (1973).

The undersigned therefore declines Larson 's invitation to "second-guess" the strategic choices made by Attorney Smith from among possible legal argument. See Strickland, supra, at 689. Smith's conduct was that of a reasonably competent attorney. Id. at 688.

Finally, Larson contends Smith should have requested imposition of sentence under 18 U.S.C. Section 4205(b)(2). As discussed

below, the sentencing court was aware of sentencing alternative sunder Section 4205; chose to impose sentence under Section 4205(a); and later declined to alter that sentence on Larson's motion for relief under Rule 35 of the Federal Rule sof Criminal Procedure. The undersigned concludes that Larson has failed to show any prejudice from this alleged oversight on the part of Attorney Smith. See Strickland, supra, at 694.

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III.

MOTION FOR NEW TRIAL

Larson has moved for a new trial "with counsel of his choice" and contends his right to chose counsel was violated when the district court denied his motion for a continuance. Motion at 57. The undersigned agrees with the government that this issue was decided by the Eighth Circuit in Larson, supra, 760 F.2d at 658-57. That court found "the trial court did not abuse its

discretion, as it had more than ample justification for refusing Larson's motion for a continuance." Id. at 857. Larson may not relitigate the denial of a continuance in this Section 2255 proceeding. See Houser, supra, at 515 and n. 27; see also United States v. Little, 608 F.2d 296, 299-300 (8th Cir. 1979), cert. denied, 444 U.S. 1089 (1980).

IV.

MOTION FOR RESENTENCING

Larson makes several arguments in support of his motion for resentencing. He contends that: (1) the sentencing court failed to make findings of fact regarding his objections to the presentence investigation report (PSI), as required by F. R. Crim. P. 32(c)(3)(D); (2) he is entitled to a sentence under 18 U.S.C. Section 4205(b)(2); (3) he was improperly sentenced for the crime of aiding and abetting; and (4) the sentencing court should not have considered two prior

convictions in imposing sentence. See Motion at 61-66. The undersigned finds no merit in any of these contentions.

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Findings of Fact Under Rule 32

Rule 32 provides for disclosure of the PSI to a defendant and his counsel before imposition of sentence. F. R. Crim. P 32(c)(3)(A). The court must afford a defendant the opportunity to comment on the PSI "and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it." Id. Rule 32 also prescribes the procedure to be used by the court in resolving any allegations of factual inaccuracy:

> If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the

> matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

Id. at 32(c)(3)(D) (emphasis added).

Larson states he has objected to the PSI on numerous occasions and he knows "there are many statements in the PSI that are not true." Motion at 64; Traverse at 22. However, Larson has not made any specific allegations in his Section 2255 motion of factual inaccuracies in the PSI, or offered any evidence to controvert any particular portion of the PSI. Moreover, Judge Murphy; comments at sentencing indicate that Larson's objections to the PSI at sentencing did not allege any

factual inaccuracy, and that he only objected to the nature of the information:

> I note the objections, but I overrule them, because the type of information that's complained about is the type that has

> generally been accepted as appropriate for a presentence investigation report.

Transcript of Sentencing at 31. It is axiomatic that where no factual inaccuracies are raised, no written findings or determinations are required. F. R. Crim. P. 32(c)(3)(D).

The undersigned concludes that the sentencing court complied with Rule 32 and Larson is not entitled to resentencing on that basis. The district court will have the opportunity, upon submission of this Report and Recommendation, to make its own findings as to whether Larson alleged any factual inaccuracies in the PSI.

Request for Sentence Under Section 4205(b)(2)

The court has twice declined to grant Larson the advantage of a sentence imposed under 18 U.S.C. Section 4205(b)(2): once at his original sentencing, and the second time by denial of his Rule 35 motion. Thus, Larson will not be eligible for parole until he has served one-third of his sentence. 18

U.S.C. Section 4205(a); United States v. Pry, 625 F.2d 689, 692 (5th Cir. 1980), cert. denied, 450 U.S. 925 (1981). The decision whether to designate a prisoner as eligible for parole under Section 4205(a), (b)(1), or (b)(2) is a matter committed to the discretion of the sentencing court. See 18 U.S.C. Section 4205. Larson has not demonstrated any abuse of that discretion.

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Aiding and Abetting

Larson contends he was improperly sentenced for both possession with intent ot distribute cocaine, 21 U.S.C. Section 841(a)(1), and aiding and abetting, 18 U.S.C. Section 2. This claim is related to his contention, discussed below, that his conviction for aiding and abetting should be vacated.

Larson is correct that the Judgment and Commitment Order, Motion Exhibit 32-10, does not state that his ten-year sentence was imposed only for his drug conviction.

However, this fact does not support Larson's conclusion that he was sentenced for aiding and abetting.

That statute in question, 18 U.S.C. Section 2, "does not define a crime but merely makes punishable as a principal on who aids and abets another in the commission of a substantive crime." Powers v. United States, 470 F.2d 991 (5th Cir. 1972). Accordingly, the aiding and abetting statute itself does not include any penalty provision. See 18 U.S.C. Section 2. The undersigned concludes that Larson, who was convicted for the substantive offense of possession of cocaine as charged in a one-count indictment, was actually sentenced for that substantive offenses.

Use of Two Prior Convictions

According to the record, the parties agreed at sentencing that one of Larson's two prior convictions had been expunged. Transcript of Sentencing at 3-4. The sentencing court also ordered that the PSI

"be altered to reflect the fact that this

one conviction was expunged ...." Id. at 31. The record therefore directly refutes Larson's claim that the sentencing court improperly considered the expunged conviction in imposing sentence upon him.

Larson also argues the sentencing court should not have considered his 1969 conviction for DWI and open bottle, and claims he was not represented by an attorney in that proceeding. Larson has apparently filed an action in Martin County, Minnesota, seeking to have this second conviction expunged. See Motion Exhibit 32-69.

The real focus of Larson's motion seems to be directed at the effect his prior conviction will have on his salient factor score an eventual release on parole. See 28 C.F.R. Section 2.20 (Salient Factor Score Manual). This is a matter for Larson to take up with the Parole Commission at his initial hearing. However, the court may

wish to clarify the record as to the effect, if any, that Larson's prior 1969 DWI conviction had upon his sentence.

V.

MOTION FOR RECONSIDERATION OF RULE 35 MOTION

Larson asks the court to reconsider its Order of February 11, 1986, which denied his motion to modify his sentence in accordance with 18 U.S.C. Section 4205(b)(2). Larson now alleges the court was misinformed as to the effect his sentence structure would have on his eligibility for parole. Larson argues that under United States v. Solly, 559 F.2d 230

(3rd Cir. 1977), the court still has jurisdiction to modify his sentence under F. R. Crim. P. 35(b). For several reasons, the undersigned concludes that this motion should be denied.

First, Larson's motion for relief under Rule 35 is untimely. On October 7, 1985, the Supreme Court declined to review the

Eighth Circuit's decision affirming Larson's convictions. See Larson, supra, 106 S.Ct. at 44. Any motion for reduction of sentence under Rule 35 had to be filed within 120 days of that date. F. R. Crim. P. 35(b). Larson filed his Section 2255 motion on June 10, 1986, which clearly exceeds the 120-day period. This court therefore lacks jurisdiction to consider relief under Rule 35.

The fact that Larson previously filed a timely Rule 35 motion only supports the second ground for denying his present motion: finality. In her Order denying Larson's previous Rule 35 motion, Judge Murphy concluded that "the sentence originally imposed was proper under all circumstances." Order of February 11, 1986. Larson did not appeal that Order to the Eighth Circuit. Compare Solly, supra, at 231 (appeal taken from denial of timely Rule 35 motion). Larson may not avoid the effect of the prior Order, which is now final, by

styling his present Rule 35 motion as one for "reconsideration" under Section 2255.

Lastly, the record does not substantiate Larson's allegation that Judge Murphy denied his Rule 35 motion based on misinformation as to the amount of time he would serve before

being paroled. Larson refers to an "interview" between his wife and Judge Murphy, but has not filed an affidavit concerning the substance of the alleged conversation. Motion at 67-68. Nor do Judge Murphy's comments at sentencing indicate any confusion about Larson's eligibility for parole. On this record, the undersigned cannot find that an experienced judicial officer such as Judge Murphy was unaware of the difference between a sentence imposed under 18 U.S.C. Section 4205(a) and 4205(b)(2). See Edwards v. United States, 574 F.2d 937, 941 (8th Cir.), cert. dismissed, 439 U.S. 1040 (1978). Thus, the

undersigned cannot conclude that Judge Murphy made a critical error or that her expectations regarding Larson's sentence have been frustrated. See generally Edwards at 942-45 (discussing so-called Kortness doctrine, established in Kortness v. United States, 514 F.2d 167 (8th Cir. 1975)).

VI.

MOTION TO VACATE AIDING AND ABETTING CONVICTION

Larson contends his conviction for aiding and abetting should be vacated because his codefendant's convictions were reversed on appeal. See Larson, supra, 760 F.2d at 857-58. The Eighth Circuit determined there was insufficient evidence for the jury to have concluded beyond a reasonable doubt that the co-defendant, Sheila Burgess, knew of the existence of the cocaine seized from the motel room or intended to aid and abet Larson's drug scheme. Id. at 858. Larson argues that since the government did not prove Burgess committed any crime, his

conviction for aiding and abetting cannot stand.

Larson's motion is essentially directed at the sufficiency of the evidence and therefore may not properly be brought in this Section 2255 proceeding. See Houser, supra 508 F.2d at 516 and n. 42. Larson offers no explanation for his failure to challenge the sufficiency of the evidence to support his aiding and abetting conviction on direct appeal. See Larson, supra.

Even if this issue were properly before the court, Larson would not be entitled to vacation of his aiding and abetting conviction. First, the conviction of another person is not an element of the offense of aiding and abetting. See 18 U.S.C. Section 2. As the Supreme Court stated in Standefer v. United States, 447 U.S. 10, 20 (1980):

> all participants in conduct violating a federal criminal statute are "principals." As such, they are punishable for

> their criminal conduct; the fate of other participants is irrelevant.

In Standefer the court upheld a defendant's conviction for aiding and abetting even though the alleged principal was acquitted of the substantive offense. Id. at 13-14.

Nor do the cases cited by Larson compel the conclusion that his conviction for aiding and abetting must be vacated because the government did not prove its case against Burgess. See United States v. Walkden, 464 F.2d 1015 (4th Cir.), cert. denied, 409 U.S. 867 (1972) (discussing proper venue); White v. United States, 366 F.2d 474 (10th Cir. 1966) (upholding conviction); Morgan v. United States, 159 F.2d 85 (10th Cir. 1947) (reversing conviction for aiding and abetting where indictment failed to

name any other person as principal).

Finally, vacating Larson's aiding and abetting conviction would not affect his

sentence for the substantive offense of possession with intent to distribute cocaine. See Issue IV, supra.

RECOMMENDATION

Based on the foregoing, the undersigned now makes the following recommendations:

1.) Larson's motion for a new trial based on his claim that evidence admitted against him was obtained in violation of the fourth amendment should be denied.

2.) If the court cannot determine from the existing record whether Larson received effective assistance of counsel, that the record be expanded under Rule 7 of the Rules Governing Section 2255 proceedings, as discussed herein.

3.) Larson's motion for a new trial "with counsel of his choice" should be denied.

4.) Larson's motion for resentencing should be denied in its entirety.

5.) Larson's motion for reconsideration of his previous Rule 35 motion should be denied.

6.) Larson's motion to vacate his aiding and abetting conviction should be denied.

Dated: April 17, 1987

FLOYD E. BOLINE
United States Magistrate

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 84-5080, 84-5081

Duane Wendall Larson,	*	
	*	
Appellant,	*	Rehearing
	*	and Rehearing
v.	*	En Banc
	*	
United States of America	*	
	*	
Appellee.	*	
	*	
Sheila Jane Burgess,	*	
	*	
Appellee,	*	
	*	
v.	*	
	*	
United States of America,	*	
	*	
Appellant.	*	

Submitted: December 10, 1984

Decided: April 11, 1985

Denied: May 31, 1985

Before HEANEY, ROSS AND FAGG, Circuit Judges.

ROSS, Circuit Judge.

A jury found Duane Wendall Larson and Shield Burgess guilty on a count of an indictment which charged them with

possessing three pounds of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1982), and aiding and abetting such action in violation of 18 U.S.C. § 2 (1982). The cocaine was discovered by police upon a warrantless search of a motel room in Burnsville, Minnesota.

On appeal, both defendants argue that the evidence obtained pursuant to the search should have been suppressed. The defendants also assert that the trial court violated their due process rights by refusing to grant a continuance and by failing to conduct a sufficient review of the magistrate's findings and recommendations on their motions ot suppress. Finally, defendant Burgess argues that the evidence was insufficient to support her conviction, that the prosecutor failed to disclose certain evidence in violation of the dictates of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and

that her due process rights were violated in that she was not given sufficient time to prepare for trial.

We affirm defendant Larson's conviction, but reverse defendant Burgess' conviction based on the insufficiency of the evidence to support her conviction. Due to our resolution

of Burgess' sufficiency of the evidence issue, we shall not address the other issues as they relate to her.

FACTS

On the afternoon of October 28, 1983, a woman rented room 124 of a Howard Johnson's motel for one night. The woman registered under defendant Burgess' name and address and advised the desk clerk that two people would be occupying the room. She paid for the room in advance, as required by motel policy.

On the morning of October 29, 1983, the woman checked out of the motel room and took

a taxi to the airport to pick up a car. She had received permission from William Webster, the assistant manager, for the other occupant of room 124 to stay in the room until 2:00 p.m. The normal checkout time is noon.

About 2:30 p.m. a maid went to clean the room, but was told by defendant Larson that "he did not want service and was staying over." The maid then informed Wester of this occurrence.

Webster sent a bellman to the room at about 5:30 p.m., since he feared that the occupant of room 124 would leave without paying for several long distance phone calls which had been made from the room. The bellman reported that the room was unoccupied.

Webster then went to examine the room himself. When no one answered the door, he entered and discovered empty liquor bottles, prescription pills, keys, and grocery bags containing plastic bags with white powder in

them. After getting the motel's assistant restaurant manager to help him examine the white powder more closely, he called the motel's general manager and the police.

At about 6:40 p.m. two Burnsville police officers arrived at the motel. Webster informed them that there were several bags containing a suspicious white powder in a vacated room.

At about 7:00 p.m. Webster knocked on the door to room 124. He was about to enter, using a passkey, when he heard an answer from within the room. Webster informed the occupant that the day's rent had not been paid. Larson replied from within that "he'd be down to take care of it in a few minutes." Webster replied "okay."

The police then knocked on the door and asked to talk to Larson. After a short delay, Larson came out of the room and closed the door behind him. When Larson refused to let the officers enter the room, the officers sought consent from the motel

manager. Upon receiving the manager's consent, the police entered room 124 and discovered the cocaine.

DISCUSSION

A. Motel Search

Larson moved to suppress the cocaine seized in room 124 on the ground that the search violated his fourth amendment rights. The government contends, the district court found, that Larson failed to meet his burden of proving that he had a legitimate expectation of privacy in room 124 at the time of the search. See Rawlings v. Kentucky, 448 U.S. 98, 104-05, 100 S.Ct. 2556, 2561-62, 65 L.Ed.2d 633 (1980); Rakas v. Illinois, 439 U.S. 128, 1313 n. 1, 99 S.Ct. 421, 424 n. 1, 58 L.Ed.2d 387 (1978).

The district court relied primarily on the decision in United States v. Parizo, 514 F.2d 52 (2d Cir. 1975). In Parizo, the court held that the admission of a sawed-off shotgun seized by a police officer from the defendant's motel room was proper since the

defendant, Chester Parizo, lacked a reasonable expectation of privacy in the motel room.

The facts in Parizo are similar to those in this case. First, like Larson, Parizo had stayed in his motel room beyond the occupancy period without paying for the next day's rent. Second, both Larson and Parizo had informed motel employees of their intent to stay in their motel rooms for an extended period. Finally, both Larson and Parizo had their rooms searched, and their contraband seized, by police officers after motel employees had discovered their contraband.

The court in Parizo applied the facts as follows:

> The facts of the present case illustrate the close relationships of these conceptual bases: when the term of a guest's occupancy of a room expires, the guest loses his exclusive right to privacy in the room. The manager of a motel then has the right to enter the room and may consent to search of

> the room and the seizure of the items there found. United States v. Croft, 429 F.2d 884 (10 Cir. 1970) provides the clearest example of this point. The defendant had rented a motel room for two days. Shortly after the checkout time on the second day law enforcement officials, with the permission of the motel manager, searched the room and subsequently removed incriminating evidence. The court stated that the constitutional protection "is dependent on the right to private occupancy of the room. When the rental period has elapsed, the guest has completely lost his right to use the room and any privacy associated with it." Id. at 887. See, also Abel v. United States, 362 U.S. 217-241, 80 S.Ct. 683 [698], 4 L.Ed.2d 668 (1960); United States v. Cowan, 396 F.2d 83 (2 Cir. 1968).

Id. at 54 (emphasis added, footnote omitted). See also United States v. Lee, 700 F.2d 424, 425 (10th Cir.), cert. denied, 462 U.S. 1122, 103 S.Ct. 3094, 77 L.Ed.2d 1353 (1983); United States v. Haddad, 558 F.2d 968, 975 (9th Cir. 1977).

[1] We agree with the reasoning in Parizo. Here, Larson's exclusive right to privacy in room 124 elapsed prior to the police search. Larson stayed in the room

seven hours beyond the checkout time and five hours beyond the time he had been given permission to stay without paying for the next day's rent in advance as required by motel policy. In addition, Larson had never checked into the room. Burgess had checked in but had also checked out several hours before the search. The district court's finding that Larson's communications with motel personnel were not sufficient to support a reasonable expectation of a right of privacy in the room under these circumstances is supported by the facts. Accordingly, we affirm the district court's finding that Larson lacked a legitimate expectation of privacy in room 124 at the time of the search.

[2] In addition, even if Larson had established a legitimate expectation of privacy in the room, the warrantless search was justified under the exigent

circumstances exception.[1] First, the officers had probably cause, under the totality of the circumstances, to believe that contraband was located in room 124. See Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983). Both the assistant manager and the assistant restaurant manager had closely examined the white powder in the plastic bags. In fact, they had even rubbed it between their fingers in an effort to determine what it was. Both concluded that the powder was an illegal substance. The police officers were fully informed of this conclusion, as well as other circumstances surrounding room 124, by the assistant manager upon their arrival at the motel.

[3] Second, exigent circumstances

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[1] The magistrate found that exigent circumstances justified the warrantless search. The district court, however, made no findings on the issue. Instead, the court denied Larson's motion to suppress the cocaine solely on the basis that Larson lacked a legitimate privacy interest in room 124 at the time of the search.

existed making it necessary to search the room before a warrant could be obtained. Room 124 was on the ground floor and had two entrances. At the time the officers entered the room they had no knowledge as to whether there were other occupants of room 124, as it had previously been thought that the room was vacant. Unless the officer acted quickly, there was a danger that the cocaine would be destroyed or removed from the room either by another occupant, or by Larson when the police were done questioning him. We have previously held that such an exigency removes the requirement that the police officers act

with a warrant. See, e.g., United States v. Knobeloch, 746 F.2d 1366, 1367, (8th Cir. 1984), cert. denied, --U.S.--, 105 S.Ct. 1362, 83 L.Ed.2d -- (1985); United States v. Palumbo, 735 F.2d 1095, 1097 (8th Cir.), cert. denied, --U.S.--, 105 S.Ct. 332, 83 L.Ed.2d 268 (1984); United States v.

Kulscar, 586 F.2d 1283, 1286-88 (8th Cir. 1978). Accordingly, we find that the district court's denial of the motion to suppress the cocaine was proper.

B. Continuance

Larson next alleges that his due process rights were violated by the trial court's failure to grant his motion for a continuance. On January 30, 1984, two days prior to trial, Larson's attorney filed a motion for a continuance. The sole reason given for the requested delay was that the attorney who was to present his case at trial, Oscar Goodman, was engaged in a trial in Nevada which would last approximately one week. Larson attached an affidavit explaining that each of his three sets of attorneys had been hired to perform specific tasks -- one to conduct the trial, one to draft and litigate pretrial motions, and one to serve as local counsel.

The district court denied the motion on the basis that Larson had been given

adequate time for trial preparation and adequate notice of the trial date. [2] The court also noted that the court had a full docket, that the court had not been informed of the division of functions amongst Larson's attorneys prior to Larson's motion for a continuance, and that Larson took a risk that his Nevada trial attorney would be engaged in a trial in that state.

On the morning of February 1, 1984, the court heard arguments on Larson's motion to withdraw appearances of all counsel other than Oscar Goodman and on a renewed motion for a continuance. The court again denied Larson's motion for a continuance. The court stated that, in addition to the

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[2] Larson had been indicted on October 29, 1983, and arraigned on November 23, 1983. At the time of arraignment, trial was set for January 25, 1984. On January 19, 1984, the trial was rescheduled to January 30, 1984, so that objections to the magistrate's findings and recommendations, which were issued on January 19th, could be filed. Subsequently, the trial was postponed until February 1, 1984, to allow counsel to file responses to their respective objections to the magistrate's findings and recommendations.

previous reasons given for denial of the motion, denial was appropriate since the case was not exceedingly complex. The court also emphasized the uncertainty of when Goodman would ever be available for trial. While Goodman had previously estimated that his trial would last one week, he was now estimating that the trial would last at least two weeks.

The court also denied Larson's motion to withdraw appearance of all counsel other than Oscar Goodman. Larson refused to permit his other attorneys (specifically, Raymond Smith, who handled the pretrial motions) to participate in the trial on the basis that he felt Oscar Goodman could do a better job and because he did not feel that the other attorneys were prepared for the trial. After fully advising Larson of the dangers of proceeding without counsel, the court permitted Larson to proceed without counsel, but asked that the other attorneys serve as standby counsel.

[4] It is well established that trial courts are vested with broad discretion in matters of continuances. See Morris v. Slappy, 461 U.S. 1, 103 S. Ct. 1610, 1616, 75 L.Ed.2d 610 (1983); Unger v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L.Ed.2d 921 (1964); United States v. Lingo, 740 F.2d 667, 668 (8th Cir. 1984). In United States v. Bernhardt, 642 F.2d 251 (8th Cir. 1981), we listed the following five factors which trial courts must weigh when exercising this discretion:

1) the nature of the case and whether the parties have been allowed adequate time for trial preparation;

2) the diligence of the part requesting the continuance;

3) the conduct of the opposing party and whether a lack of cooperation has contributed to the need for a continuance

4) the effect of the continuance and whether a delay will seriously disadvantage either party;

5) the asserted need for the continuance, with weight to be

> given sudden exigencies and unforeseen circumstances.

Id. at 252. The trial court here recognized the existence of these factors, as it cited Bernhardt when denying Larson's motion for a continuance.

[5] Each of the factors as applied to Larson's case indicates that Larson's motion for a continuance was properly denied. First, the case was not complex, and adequate time for trial preparation and adequate notice of the scheduled trail date had been given. Second, the defense team exhibited a lack of diligence in that the court was not informed of Goodman's status as trial attorney, or of his scheduling conflict, until two days before trial. Third, the government did not contribute in any way to the need for a continuance. Fourth, denial of the continuance did not seriously disadvantage Larson, as he had attorneys available to him who were thoroughly familiar with his defense and competent to handle the trial. Finally,

Goodman's scheduling conflict was not altogether unforeseeable. If the court had been put on notice of the problem earlier, it might have been able to accommodate Goodman's schedule. In sum, we find that the trial court did not abuse its discretion, as it had more than ample justification for denying Larson's motion for a continuance.

C. Review of Magistrate's Recommendations

[6] Larson's final claim is that the trial judge failed to make a de novo review of the record of the hearing before the magistrate on the motion to suppress, or of the particular findings and recommendations of the magistrate which he objected to. This claim is primarily founded on the fact that the trial judge's order denying Larson's motion to suppress the cocaine was issued on January 31, 1984 -- only one day after Larson filed his objections to the magistrate's findings and recommendations and only eleven days after the magistrate's

findings are recommendations were filed.

The Federal Magistrates Act provides that: "A judge of the court shall make a de novo determination of those portions of the [magistrate's] report or specified findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1) (1982). In addition, the Fifth Circuit has held that constitutional concerns required that "an appellate court***be satisfied that a district judge has exercised his non-delegable authority by considering the actual testimony, and not merely be reviewing the magistrate's report and recommendations." United States v. Elsoffer, 664 F.2d 357, 359 (5th Cir. 1981). See Hernandez v. Estelle, 711 F.2d 619, 620 (5th Cir. 1983). See generally United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980).

We are satisfied that the trial judge here exercised her authority properly, as her order denying Larson's motion to

suppress the cocaine expressly states that she made a de novo review of the record and that she conducted a thorough review of all objections and responses to the magistrate's findings and recommendations.

D. **Sufficiency of the Evidence (Burgess)**

Burgess argues that the evidence was insufficient to support her conviction for possession of cocaine with intent to distribute and for aiding and abetting Larson in such action. To establish Burgess' guilt on the possession with intent to distribute charge, the government was required, of course, to establish Burgess' possession of the cocaine. This court has determined that the requisite possession may be either actual or constructive, and has defined constructive possession as "knowledge of presence plus control." United States v. Caspers, 736 F.2d 1246, 1249 (8th Cir. 1984).

[7] To establish Burgess' guilt on the aiding and abetting charge, the government

was required to establish that Burgess

associated herself with the unlawful venture, that she participated in it as something she wished to bring about, and that she sought by her action to make it succeed. Nye & Nissen v. United States, 336 U.S. 613, 619, 69 S.Ct. 766, 769, 93 L.Ed. 919 (1949); United States v. Anziano, 606 F.2d 242, 244-45 (8th Cir. 1979). Since Burgess must have engaged in "some affirmative participation *** which at least encourages the perpetrator,'" here "mere presence *** at the scene of the crime or *** [her] mere association with persons engaged in illegal activity is not sufficient" to establish that she was guilty of aiding and abetting. United States v. Anziano, supra, at 245 (quoting United States v. Knife, 592 F.2d 472, 476 (8th Cir. 1979)). See United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971).

When reviewing the sufficiency of the

evidence to uphold a guilty verdict, we apply the following principles:

> First, the court must view the evidence in the light most favorable to the verdict rendered. Second, the court must accept all reasonable inferences which tend to support the jury verdict. Third, the evidence need not "exclude every reasonable hypothesis except that of guilt but simply that it be sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty."

United States v. Wells, 721 F.2d 1160, 1161 (8th Cir. 1983) (quoting United States v. Taylor, 599 F.2d 832, 838 (8th Cir. 1979)) (citations omitted). Applying these principles, we find that the evidence does not sufficiently establish Burgess' guilt.

[8] The evidence against Burgess consists almost exclusively of the fact that she had checked into and stayed with Larson in the motel room from which the cocaine was later seized. But, as Burgess emphasizes, she had checked out of the motel room over seven hours before the evidence establishes

that the cocaine was in the motel room.[3]

In addition to Burgess' presence at the motel room, the government attempts to use certain other circumstantial evidence to infer Burgess' guilt. First, the government points out that Burgess had familial and financial relationships with Larson, in that Larson was married to Burgess' sister and Larson had a financial interest in Burgess' two cars. According to the government, the inference to be drawn from this evidence is that Larson and Burgess are in the drug business together.

Second, the government emphasizes that Burgess had picked up a car at the airport after checking out of the motel. According to the government, the inference to be drawn is that Burgess picked up the cocaine at the airport and then took it to Larson.

The government's evidence is so scant

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[3] Burgess checked out at about 10:30 a.m. The assistant manager first discovered the cocaine at about 6:00 p.m. There is no evidence as to the actual time at which the cocaine made its way into the motel room.

that the jury could only speculate as to Burgess' guilt. The evidence is such that a reasonably minded jury must have a reasonable doubt as to Burgess' knowledge of the existence of the cocaine or of her intent to aid and abet Larson's drug scheme. See United States v. Frol, 518 F.2d 1134, 1137 (8th Cir. 1975); United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973). Accordingly, the facts of this case require that we vacate the judgment of conviction as to Burgess.

In sum, the judgment of the district court is affirmed as to Larson and reversed as to Burgess.

ASST. U.S. ATTORNEY VOSEPKA'S RESPONSE (PP. 2-5) OF 8-20-86 TO PETITIONER'S 28USC2255.

ARGUMENTS

I. Motion of Suppression of Cocaine

Larson claims that the search of the bags in which his three pounds of cocaine was found was illegal; therefore, the

cocaine must be supressed as evidence. The basis of his claim is that, while warrantless entry into the motel room and seizure of the bags may have been legal because he no longer had a reasonable expectation of privacy in the room, he retained an expectation of privacy in his personal effects in the room which necessitated a warrant before a search of the bags could be made. Larson has raised numerous arguments and cited numerous cases in his 46-page motion. However, these issues have already been decided adversely to Larson on appeal and, thus, he should not be allowed to raise it by motion. Houser v. United States, 508 F.2d 509, 514 n.6 (8th Cir. 1974).

In United States v. Larson, 760 F.2d 852 (8th Cir. 1985), the Eighth Circuit held that the motel search did no violate Larson's Fourth Amendment rights because he had no reasonable expectation of privacy in the room and, even if he had, exigent

circumstances justified the search. All relevant facts and circumstances were known to the court. The court cited with approval the reasoning in United States v. Parizo, 514 F.2d 52, 54 (2nd Cir. 1975) that when the rental period expires the occupant loses his right to privacy in the room and the motel manager has the right to enter the room and consent to the search and seizure of items found in the room. Larson v. United States, supra at 855. Neither Larson nor his belongings were, therefore, protected under the Fourth Amendment.

The only case cited by Larson that appears to warrant some comment is United States v. Owens, 782 F.2d 146 (10th Cir. 1986). In this Tenth Circuit case, the defendant sought and was granted a suppression of the cocaine as evidence based on an expectation of privacy in the motel room and an expectation of privacy in a closed bag in which the cocaine was found within the room.

Owens, supra, is clearly distinguishable from the case at bar on numerous factual grounds:

1. Owens had paid the motel in advance for a term which would include the day of the search (although the motel sought to dispute the term of the payment). Larson had not paid for the day he was in the room when it was searched.

2. Because of the arrest and removal of Owens and his girlfriend, the police had full control of room and could have gotten a warrant for closed containers within. In Larson, the Eighth Circuit specifically found that there were exigent circumstances warranting the police search.

3. The items seized in Owen's room were in a closed bag in a closed dresser drawer. In Larson, the cocaine was in open grocery bags as evidenced by the observations of motel personnel who entered the unoccupied and unrented room before the police arrived.

It is significant that Owens, supra, found a reasonable expectation of privacy in the room whereas Larson, 760 F.2d, supra, did not. It is also significant that Owens, supra, neither reversed nor cited United States v. Croft, 429 F.2d 884 (10th Cir. 1970), which held that Fourth Amendment protection is dependent on the right to private occupancy of a motel room:

When the rental period has elapsed, the guest has completely lost his right to use the room and any privacy associated with it. The manager of the motel may then freely enter the room, rent the room to others, and remove any belongings left in the room...Since after the rental period expires a guest has no right or privacy, there can be no invasion thereof.

Id. at 887. The necessity of a factual comparison between Owens, supra, and Larson, 760 F2d, supra, emphasizes that the issue here is a direct appeal issue and because Larson's claim has already been decided on appeal, his motion should be denied.